No. 72-734

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

INDEX

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

Northern District of Ohio—Eastern Division

Title of Case	Attorneys
THE UNITED STATES	*For U. S.:*
	For Defendant:
vs.	LEONARD YELSKY Leader Bldg.
JOHN P. CALANDRA	Gold, Rotatori, Messerman & Hanna 1100 Investment Plaza 44114

Statistical Record	Costs
J.S. 2 mailed May 31 1971	Clerk
J.S. 3 mailed	Marshall
Violation Possession of firearm having been prev. convicted of a felony	Docket fee
Title 18	
Sec. 1202(a)(1) USC 3 count indictment	(5-12-71 Registry 2500.00)

Date	Proceedings
5/12/71	Indictment filed.
5/12/71	Oral request for warrant of arrest. Warrant of arrest issued 5/12/71. Bail fixed at $10,000.00 corporated surety bond., Lambros, J. Bond reduced to $2,500.00 personal bond (5/12/71).
5/12/71	Appearance bond filed in the amount of $2,500.00. (Personal)

Date	Proceedings
5/14/71	Warrant of arrest of the def. returned and filed. Def. arrested 5/12/71.
5/12/71	Order that upon oral motion of the def. the def. now be admitted to bail on a $25,000 bond with satisfaction by a 10% cash deposit under 18 U.S.C. sec. 3146(a) (3). Copies to U.S. Atty & Yelsky. (5/12/71).
8/16/71	Minutes of proceedings filed. Deft arraigned, plea of not guilty entered; bond continued. Green, J. Parise, R.
8/17/71	Motion of deft to suppress and return property illegally seized with memorandum in support filed. Copy mailed.
8/25/71	Supplemental memorandum in support of motion for suppression and return of property illegally seized filed. Copy mailed.
8/27/71	Memorandum of Govt. in opposition to motion of deft. for suppression and return of property filed. Copy mailed 8/27/71.
8/31/71	Reply of deft to Govt's memo. in opposition to deft's motion for suppression and return of illegally seized evidence filed. Copy mailed 8/31/71.
8/27/71	Minutes of proceedings filed. Immunity Hearing begun & concluded; Battisti, J. Parr
9/3/71	Supplemental memo. of Govt in opposition to deft's motion for suppression and return of property seized. Copy mailed 9/3/71.
9/23/71	Order continuing Motion to suppress for pre-Trial hearing; further order that Court does not believe that any seizure other than the weapons is relevant to this case, & other items of evidence to which the motion is directed need not be considered herein. The issue of the Sufficiency of the affidavit can be deferred until the evidentiary hearing, for if it is determined that there was no probable cause to seize the weapons the sufficiency of the affidavit becomes moot filed. Green, J. True Copies to U.S. Atty & Gold (Noted 9/29/71)

Date	Proceedings
10/1/71	Memorandum Opinion & order suppressing evidence seized as search went beyond scope of search warrant & warrant was not based upon probable cause; further that Calandra need not answer questions before Grand Jury based on this evidence; further directing that evidence seized is to be returned to Calandra forthwith filed. Battisti, J. Copies handed to Rotatori & Gary. (Noted 10/1/71.)
10/29/71	Motion by U.S.A. to stay execution of the Court's order suppressing evidence and ordering the return of seized property filed. Copy mailed 10/29/71.
10/29/71	Notice of Appeal by U.S.A. filed. Copy by clerk to U.S. Atty. & Rotatori & U.S. Court of Appeals.
11/2/71	Endorsed order granting motion of U.S.A. to stay execution if Court's order suppressing evidence and ordering return of seized property. Battisti, J. Copies mailed to Olah & Rotatori. (Noted: 11/2/71).
11/4/71	Motion of Deft Calandra for reconsideration, in part, of Ct's Order Staying execution of the return of seized property filed. Copy mailed 11/4/71.
11/5/71	Response of U.S. to Deft John P. Calandra's Motion for reconsideration of the Court's Order staying the execution of the Return of seized property pending appeal filed. Copy mailed 11/5/71.
11/12/71	Endorsed Order granting motion of Defts for reconsideration & directing that copies of the Stock Certificates are to be made & Transmitted to the Dept of Justice. Battisti, J. Copies mailed to Margolis & Rotatori (Noted 11/16/71).
11/22/71	Transcript of Proceedings filed before Battisti, J. on 8/27/71 filed. Parise, R.
11/27/71	Memorandum of U.S.A. in support of motion of U.S.A. to immunize John P. Calandra and compel testimony pur. to T. 18, Sec. 2514 filed. Copy mailed 8/27/71.

Date	Proceedings
12/24/71	Request of Respondent for postponement of hearing on application for immunity order filed.
12/24/71	Memorandum of Respondent in support of request for postponement of hearing on application for immunity order filed.
12/24/71	Petition of U.S.A. for order of immunization and to compel testimony before Grand Jury filed.
12/24/71	Affidavit of Robert D. Gary filed.
12/24/71	Designation of record for Appeal filed.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DIVISION OF THE NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA VS. Premises located 700 East 163rd Street, Cleveland, Ohio, a two-story beige brick building, with two doors facing 163rd Street, "Royal Machine and Tool Company" is printed on side located on east side of 163rd Street	Commissioner's Docket No. 8 Case No. 3777 Search Warrant

To CHARLES G. CUSICK, SAC, Cleveland, or any other FBI Agent.

Affidavit having been made before me by Special Agent JOSEPH G. MASTERSON, that he has reason to believe that on the premises known as 700 East 163rd Street, Cleveland, Ohio, a two-story beige brick building, with two doors facing 163rd Street, "Royal Machine and Tool Company" is printed on side located on east side of 163rd Street in the Northern District of Ohio there is now being concealed certain property, namely bookmaking records and wagering paraphernalia consisting of but not limited to betting slips and cash, bet notices, and books of records which are intended for uses in violation of Sections 371, 1084, and 1952, Title 18, United States Code.
and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application or issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and

making the search in the daytime [1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 11th day of December, 1970

/s/ Clifford E. Bruce,
U.S. Commissioner.

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

RETURN

I received the attached search warrant December 11, 1970, and have executed it as follows:

On December 15, 1970 at 12:05 o'clock PM, I searched the premises described in the warrant and

I left a copy of the warrant with John CALANDRA together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This is to certify that on December 15, 1970 at 4:45 P.M., Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice, at the time of conducting a search of my premises at 700 E. 163rd St., Cleveland, Ohio, obtained the above-listed items. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice.

Signed

JOHN P. CALANDRA refused to sign.

This inventory was made in the presence of Special Agent RICHARD MOHR, JOHN RELIC, JOHN CALANDRA and JOHN CALANDRA JR.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Thomas J. Rordin

Subscribed and sworn to and returned before me this 18th day of December, 1970.

/s/ Clifford E. Bruce
U.S. Commissioner.

INVENTORY

From Desk of Lynn Smith:

1) Football parlay card (1)
2) Pro football schedule

From stand in back of first desk in first rear room by lavatory wall:

1) tear sheet from desk pad containing telephone numbers

From File Cabinet in rear of back office with combination lock on top drawer:

1) grey card holder containing cognovit notes and other notes, loose papers and cards indicating names of persons and their indebtedness

From top of back desk in back office:

1) Address book with numerous notations and loose pieces of paper with names and addresses and phone numbers
2) TR 1 piece with Hammond Type Co., TR 11 pieces of Allan United States Steel Corp paper with notations of them.
3) 2 adding machine tapes
4) 2 pieces of paper clipped together with one a 4" x 6" card and a small piece of paper.
5) An envelope containing 2 pieces of paper

From desk in back office by lavatory:

1) Yellow pad with names and figures

From lock top drawer of File Cabinet in rear office:

1) Folder containing miscellaneous pieces of paper pertaining to stock certificates and the following stocks:
   (1) listed to Lillian E. Schmiel
      1. 50 shares of Tenna Corp. stk # 10224
      2. 100 shares of Tenna Corp. stk # 26351
      3. 100 shares of Tenna Corp. stk # 26354
      4. 100 shares of Tenna Corp. stk # 26355
      5. 100 shares of Tenna Corp. stk # 26356
      6. 100 shares of Tenna Corp. stk # 26357
      7. 100 shares of Executive House, Inc. stk # C 26035

INVENTORY

8. 100 shares of Executive House, Inc. stk # C 26036
9. 75 shares of Executive House, Inc. stk # C 03700
10. 100 shares of General Mortgage Investments stk # C 13589
11. 100 shares of Associated Oil & Gas Co. stk # H 26829
12. 100 shares of Associated Oil & Gas Co. stk # H 26828
13. 100 shares of North Central Airlines, Inc. stk # MC 30204
14. 100 shares of Transducer Systems, Inc. stk # N 2728
15. 100 shares of Alcoa Standard Corp. stk # CC 11096
16. 100 shares of Alcoa Standard Corp. stk # CC 11095
17. 100 shares of Alcoa Standard Corp. stk # CC 9133
18. 100 shares of Boston Capital Corp. stk # BC 83603
19. 100 shares of Boston Capital Corp. stk # BC 83604
20. 100 shares of Boston Capital Corp. stk # BC 83605
21. 300 shares of Boston Capital Corp. stk # 202418
22. 11 shares of Modern Food, Inc. stk # 17324
23. 100 shares of Modern Food, Inc. stk # 6408
24. 10 shares of Modern Food, Inc. stk # 10929
25. 4 shares of Fisher Foods, Inc. stk # C 026083
26. 2 shares of Fisher Foods, Inc. stk # C 021064
27. 2 shares of Fisher Foods, Inc. stk # C 018234
28. 1 share of H. M. Hooper Co. stk # C 10077
29. 14 shares of Worthington Steel stk # 6334
30. 100 shares of Mite Corp. stk # Y 23709
31. 100 shares of Mite Corp. stk # Y 23710
32. 100 shares of Mite Corp. stk # Y 23711

INVENTORY

Items from Folder from locked drawer of back file cabinet, continued

33. 100 shares of Benguet Consolidated Inc. stk # N 779038
34. 100 shares of Benguet Consolidated Inc. stk # N 779039

(2) listed to Martha Delsanter
1. 100 shares of Executive House, Inc. stk # C 27173
2. 100 shares of Executive House, Inc. stk # C 27181
3. 100 shares of Executive House, Inc. stk # C 26393
4. 100 shares of Executive House, Inc. stk # C 26394

(3) listed to John Livavoli
1. 100 shares of Executive House, Inc. stk # C 23976
2. 100 shares of Executive House, Inc. stk # C 23977

(4) listed to Leo Moceri
1. 100 shares of Executive House, Inc. stk # C 26395
2. 100 shares of Executive House, Inc. stk # C 26396
3. 100 shares of Executive House, Inc. stk # C 26397

(5) listed to John P. Calandra
1. 100 shares of Modern Foods, Inc. stk # 7218
2. 10 shares of Modern Foods, Inc., stk # 10610
3. 11 shares of Modern Foods, Inc., stk # 16642

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DIVISION OF THE NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA VS. Premises located 700 East 163rd Street, Cleveland, Ohio, a two-story beige brick building, with two doors facing 163rd Street, "Royal Machine and Tool Company" is printed on side located on east side of 163rd Street	Commissioner's Docket No. 8 Case No. 3777 Affidavit for Search Warrant

BEFORE _____
(Name of Commissioner)

_____
(Address of Commissioner)

The undersigned being duly sworn deposes and says:

That he has reason to believe [1] that on the premises known as 700 East 163rd Street, Cleveland, Ohio, a two-story beige brick building, with two doors facing 163rd Street, "Royal Machine and Tool Company" is printed on side located on east side of 163rd Street in the Northern District of Ohio there is now being concealed certain property, namely book-making records and wagering paraphernalia consisting of but not limited to betting slips and cash, bet notices, and books of records.
which are intended for uses in violation of Sections 371, 1084, and 1952, Title 18, United States Code.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (See attached affidavit.)

/s/ Joseph G. Masterson
Special Agent FBI

Sworn to before me, and subscribed in my presence, December 11, 1970

/s/ Clifford E. Bruce
United States Commissioner.

AFFIDAVIT

The undersigned being duly sworn deposes and says:

1. Affiant is employed as a Special Agent of the Federal Bureau of Investigation and has continuously held that position for the past five and one-half years. Affiant has been assigned since April, 1969, to the investigation of gambling matters within the jurisdiction of the Cleveland Division of the Federal Bureau of Investigation.

2. Affiant has had supervision of the investigation of the gambling activities of JOSEPH J. LANESE, hereinafter referred to as JOSEPH LANESE, since July, 1969.

3. Affiant has been in contact with other Special Agents of the Cleveland Division assigned at Youngstown, Ohio, as well as other Agents assigned at Cleveland, Ohio, and has read this affidavit and is satisfied that the information contained therein is reliable. Affiant adopts and incorporates the information contained herein as his affidavit.

4. Based on the information contained herein, affiant has reason to believe and does believe that JOSEPH LANESE has made interestate telephone calls to obtain wagering information which he has subsequently disseminated to ANTHONY DELSANTER and other engaged in the business of booking and wagering and have utilized this information, all in violation of Title 18, Sections 371, 1084 and 1952, United States Code.

JOSEPH LANESE AND ANTHONY DELSANTER,
also known as Tony and Tony the Dope

Pursuant to a court order signed by U.S. District Court Judge FRANK J. BATTISTI, Northern District of Ohio, at 12:10 p.m., November 9, 1970, an electronic surveillance was established on the two telephones located at 20470 Naumann, Euclid, Ohio. This surveillance was terminated on November 23, 1970.

Records of the Ohio Bell Telephone Company reflect that 486-1552 and 486-1142 are listed to JOSEPH LANESE at his residence, 20470 Naumann, Cleveland, Ohio.

The above court order further authorized electronic surveillances of telephone numbers 531-9676 and 531-9855, located at Gray Drug Store, 670 East 185th Street, Cleveland, Ohio, and telephone number 531-9899, which is located in the Top Hat Tavern, 661 East 185th Street, Euclid, Ohio. The court order authorized the utilization of the electronic surveillances on the telephones at Gray Drug Store and The Top Hat Tavern, whenever physical surveillance placed JOSEPH LANESE in Gray Drug Store or the Top Hat Tavern. The electronic surveillances on the telephones began on November 9, 1970, and was terminated on November 23, 1970.

JOSEPH LANESE has been placed at the above-mentioned residence, 20470 Naumann Avenue, by physical surveillance by Agents of the FBI and by name through monitoring of the telephones pursuant to this court order on November 10 through 23, 1970.

JOSEPH LANESE has been placed at Gray Drug Store, 670 East 185th Street, Cleveland, Ohio, by physical surveillance by Agents of the FBI and by name through monitoring of the telephones pursuant to this court order on November 9, 10, 11, 12, 13, and 14, 1970.

JOSEPH LANESE has been placed at the Top Hat Tavern, 661 East 185th Street, Euclid, Ohio, by physical surveillance by Agents of the FBI and by name through monitoring of the telephone pursuant to this court order on November 9, 10, 11, 12, 13, and 14, 1970.

FBI surveillance has shown JOSEPH LANESE to operate a 1969 Cadillac, with metallic green bottom and black vinyl top, sedan, four door, bearing 1970 Ohio license QE-211.

On November 12, 1970, JOSEPH LANESE, placed a long distance call to either telephone number 331-8335 or 771-0845, from telephone number 531-9676, Gray Drug Store, at about 1:54 p.m., through the operator. The operator first tried number 331-8335 and it was busy, and then was told by JOSEPH LANESE to try 771-0845 and same area cole. He informed the operator that these two phones were in the same house. The operator tried this number, 771-0845, and it was also busy. She again tried them both, and the call was completed on the second try. A male answered the phone and JOE said "BILL." BILL informed JOE to wait a minute. BILL then gave JOE the betting line on two football games, Georgia plus twenty and Boston College plus six. BILL informed JOE that there were no horses.

Investigation by FBI Agents at Pittsburgh, Pennsylvania, determined that telephone numbers 331-8335 and 771-0845 are listed to ANTHONY J. CIHAL and WILLIAM CIHAL, 3905 Mayfair Street, Pittsburgh, Pennsylvania.

The above sequence shows that LANESE received wagering information concerning the Georgia and Boston College games from Pittsburgh, Pennsylvania. The information concerned the point spread on the Georgia and Boston College football games.

ANTHONY DELSANTER has been identified by physical surveillance by FBI Agents as having been in the Top Hat Tavern with JOSEPH LANESE and by his name and his distinctive voice and accent through monitoring of the telephones pursuant to this court order.

An incoming call was received on telephone number 531-9899, at 1:52 p.m., November 12, 1970, for Grandpa from ANTHONY DELSANTER. He was told that JOE was across the street, and he asked if someone could go get him. While waiting for JOE to come to the phone, DELSANTER made reference to some horse races in Chicago and Cleveland. DELSANTER states that he gave me one horse in Chicago and one in Cleveland. JOSEPH LANESE comes on the line and gives the betting line, Georgia plus twenty and Boston College plus six, he had just received from WILLIAM CIHAL, Pittsburgh, Pennsylvania, to ANTHONY DELSANTER. DELSANTER states that he will be at Cherry's in about thirty minutes.

On November 12, 1970, at 2:00 p.m., from telephone number 531-9899, JOSEPH LANESE called 795-2949. He referred to the male answering as GARY. He discussed line information with him, then layed off a $400.00 bet on Georgia plus twenty. Investigation by FBI Agents at Cleveland, Ohio, determined that this number is listed to GARY STIVER, 1960 East 126th Street, Cleveland, Ohio.

The above sequence shows that LANESE furnished the wagering information concerning the Georgia and Boston College football games, he obtained from WILLIAM CIHAL in Pittsburgh, Pennsylvania, to ANTHONY DELSANTER, who is in the Warren, Ohio area, when calling LANESE. After discussing the line information, DELSANTER and LANESE decide to lay off bets to GARY STIVER on the line information obtained from CIHAL in Pittsburgh, Pennsylvania.

On November 13, 1970, there was an incoming call on telephone number 531-9899. The person calling asked for

Grandpa. JOSEPH LANESE comes to the phone and discusses tickets and advises he will send them to caller's, ANTHONY DELSANTER, address at 373 Central Parkway. DELSANTER and LANESE discuss the betting line on certain football games and plays they have made, and bets with GARY.

DELSANTER stated he is at Cherry's and LANESE states you're right near pay station and tells DELSANTER to call that guy, and DELSANTER states "BILL". LANESE then gives the following numbers in Italian and English, 412-331-8335 and 412-771-0845. DELSANTER states he had them written down, but could not find them. DELSANTER states that number 771-0845 is the one he used to call, all the time. DELSANTER is to call LANESE back, if he gets something.

On November 13, 1970, at about 2:40 p.m., there was an incoming call to the Top Hat Tavern, 531-9899. JOSEPH LANESE come to the phone and caller, GARY, states that TONY just called him and told him to call LANESE and give him a message, "9th at Laurel, Bet Bravo, twice as much and same race, Last Hill, half as much, and nothing on football." GARY states he's, referring to TONY, two, two and $1.00 to place. LANESE and GARY discuss TONY's betting on the horse races.

The above sequence indicates that ANTHONY DELSANTER on instructions from JOSEPH LANESE, called WILLIAM CIHAL on either telephone number 412-331-8335 or 412-771-0845, in Pittsburgh, Pennsylvania, and obtained information on two horses in the 9th race at Laurel, Maryland. CIHAL further stated that DELSANTER advised there was no new information or line on the football game. This information was then passed on to GARY, who accepted two bets from DELSANTER on the horse race at Laurel, Maryland. GARY then called JOSEPH LANESE and furnished the information about no change in the football line and the horse race from DELSANTER to LANESE.

On November 14, 1970, from telephone number 531-9676, JOSEPH LANESE called long distance, through the operator, to area code 412 and telephone number 331-8335. LANESE advised the operator he was calling from 531-9674. JOSEPH LANESE referred to the person answering as BILL, and BILL furnished part of the college and professional football line to LANESE. LANESE stated that was enough, he has the rest.

Numerous calls were made from 531-9899, 531-9855, 531-9676 to the above Pittsburgh, Pennsylvania numbers 331-8335 and 771-0845.

After receiving the above information, LANESE would repeatedly furnish this information to numerous individuals, either through the use of telephone numbers 531-9855, 531-9676, or through the use of telephone numbers 486-1142 and 486-1552, located at 20470 Naumann Avenue, Euclid, Ohio, which is the residence of JOSEPH LANESE.

Informant 1 advised on December 1, 1970, that as of that date, JOSEPH LANESE continues to make book on the east side of Cleveland on 185th Street and he also works out of his home. DELSANTER continues in his gambling operation in the Warren, Ohio area, and no one can book in Warren, Ohio area without his personal O.K. DELSANTER has four or five persons working for him taking bets and handling his action. DELSANTER works out of three or four locations in the Warren, Ohio area.

JOSEPH LANESE, utilizing one of the following telephones 531-9899, 531-9855, 531-9676, 486-1142, and 486-1552, would furnish football line information to numerous individuals. Among the individuals who have been identified as receiving this information are ANTHONY DELSANTER, also known as Tony the Dope; RONALD J. RADO; JOSEPH SPAGANLO, also known as Joseph Spagnola; JOHN NARDI; JOHN CALANDRA; CHUCKIE COMELLA; CHARLIE MOORE; RICHARD STEWART; FREDDIE BENTOFF, and GARY STIVER.

During the time of the court order, there were numerous occasions when JOSEPH LANESE would call ANTHOHY DELSANTER at his residence in Warren, Ohio, and have discussions concerning their wagering activity.

The affiant, based on the facts set forth above, now has reason to believe and does believe that on the premises further described hereinafter and on the persons of JOSEPH LANESE and ANTHONY DELSANTER and in LANESE's vehicle, there is located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices, and books of account in violation Sections 371, 1084 and 1952, Title 18, United States Code. JOSEPH LANESE's premises are further described as a two-story white frame house, with red brick front on the lower portion of the house, and detached garage on the left side of the house towards the rear and at the end of a driveway, at 20470 Naumann Avenue, Euclid, Ohio. Investigation by FBI Agents reveal that LANESE continuously utilizes and drives a 1969 Cadillac, metallic green bottom

and black vinyl top, four door, with 1970 Ohio license QE-211. The Department of Motor Vehicles for the State of Ohio has advised that 1970 Ohio license QE-211 is registered to NICHOLAS DICILLO, 6751 Gates Mills Boulevard, Gates Mills Village, Ohio. Surveillance has placed JOSEPH LANESE in this vehicle on numerous occasions, during the past six months, and he being the only male driver.

ANTHONY DELSANTER's residence is more fully described as a two-story frame dwelling, white in color with blue trim, with what appears to have been an attached garage, which has been converted to a beauty shop and is known as Marty's Hair Fashion. The dwelling is located at 373 Central Parkway on the east side of the street, in Warren, Ohio.

CHERRY'S TOP OF THE MALL RESTAURANT

Investigation by Agents of the Federal Bureau of Investigation has revealed that telephone number 545-2521 is listed to Cherry's Top of the Mall Restaurant, Eastwood Mall, Niles, Ohio.

Pursuant to a court order signed by U.S. District Court Judge FRANK J. BATTISTI, Northern District of Ohio, 12:10 p.m., November 9, 1970, an electron surveillance was established on five telephones being utilized by JOSEPH LANESE in his bookmaking activity. Two of these telephones were located at 20470 Naumann Avenue, Euclid, Ohio, the residence of JOSEPH LANESE.

Numerous conversations monitored over the telephones at JOSEPH LANESE's residence and the other telephones during the period of November 9 through 23, 1970, reflect the following concerning Cherry's Top of the Mall.

On November 13, 1970, there was an incoming call on telephone number 531-9899. The person calling asked for Grandpa. JOSEPH LANESE comes to the phone and discusses tickets. The person calling was referred to as TONY and gave his address as 373 Central Parkway, which is the address of ANTHONY DELSANTER. DELSANTER stated that he was at Cherry's and LANESE instructed DELSANTER to use the station there, and call WILLIAM CIHAL in Pittsburgh, Pennsylvania at telephone numbers 412-331-8335 or 771-0845.

On November 13, 1970, at about 7:29 p.m., JOSEPH LANESE made a long distance call to 545-2521, Niles, Ohio, from 486-1552, advised ANTHONY DELSANTER, also known as Tony

the Dope that there was a one game switch. On November 17, 1970, at about 5:11 p.m., JOSEPH LANESE called telephone number 545-2521 and gave ANTHONY DELSANTER, who gets on the line, horse race results of "Don George" in the last at Laurel. LANESE advises DELSANTER that he has GARY's line, but it was not good, and was going out to make some calls.

During the course of the monitoring, numerous calls were made to and from Cherry's Top of the Mall Restaurant wherein JOSEPH LANESE furnished football line information to ANTHONY DELSANTER. On one occasion, DELSANTER stated he made a mistake and had Cherry's sheet.

The affiant, based upon the facts set forth above, now has reason to believe, and does believe, that on the premises, further described hereinafter, known as Cherry's Top of the Mall Restaurant, Eastwood Mall, Niles, Ohio, there are located bookmaking records and wagering paraphernalia consisting of, but not limited to, betting slips and cash, bet notices, and books of account, in violation of Sections 371, 1084, and 1952, Title 18, U.S. Code.

Cherry's Top of the Mall Restaurant is located on the second floor of the Eastwood Mall near the center and south entrance to the mall. It is located above McKelvey's Loft and is east of Strouss Department Store. Cherry's has a brick type front and operates as a restaurant.

JOHN CALANDRA

JOHN CALANDRA has been identified by name and phone number on numerous incoming and outgoing telephone calls to JOE LANESE while LANESE was at his residence or at the Top Hat Tavern. CALANDRA and LANESE have discussed point spreads and bets they are making.

On Sunday, November 15, 1970, at 8:52 AM, LANESE called 381-8414 to advise that he would be home for the next two hours and then he was going to a phone.

The conversation disclosed the betting relationship between JOHN CALANDRA and JOSEPH LANESE. The conversation indicates that CALANDRA and LANESE bet on seven games and won five. The reference to "changing" refers to the line and LANESE indicated that there were no changes and that he would make a call from another phone to get any changes. He indicated that the call was being made from another phone due to LANESE's belief that his phone was "bugged".

Physical surveillance of JOSEPH LANESE placed him at the Pancake House, 22780 Shore Center Drive, on public phone number 731-9794, during period 11:30 AM to 11:50 AM. Records of the Ohio Bell Telephone Company reflect that a call was made to 412-331-8335 in Pittsburgh, on November 15, 1970, at 11:42 AM. As previously set out, this is listed to WILLIAM CIHAL.

On November 15, 1970, at 12:51 PM, LANESE called 231-9635, the Fai-Com Club and asked for JOHN CALANDRA from his home phone 486-1552. LANESE told CALANDRA to add Detroit. CALANDRA asked what the point spread was and LANESE said it was eight. CALANDRA asked if that was the only bet and LANESE told him to add it to the others. CALANDRA then added up the others and said they had six others.

The above set of facts indicate that at 8:52 AM JOSEPH LANESE called JOHN CALANDRA and advised him that he had no changes regarding the bets they had made for Sunday, November 15, 1970, but that LANESE would check later. The call to a known bookmaker at 11:50 AM which was almost two hours later, as LANESE indicated, shows that he checked for any last minute games and changes in the line. After several unsuccessful tries due to the line being busy, LANESE contacted CALANDRA at 12:51 AM and gave him the change he had received, which was for CALANDRA to bet Detroit plus eight.

During the period of the electronic surveillance, LANESE contacted CALANDRA at 381-8414 listed to JOHN CALANDRA, 700 Quilliams. On November 13, 1970, JOSEPH LANESE was surveilled to 700 East 163rd Street, a brick building with name Royal Machine and Tool Co. on the side of the building. LANESE was driving a green with black top, 1969 Cadillac, Ohio license QE 211. Investigation by Special Agents of the FBI revealed that JOHN CALANDRA is president and owner of Royal Machine and Tool Company, 700 East 163rd.

On November 16, 1970, at 7:15 PM, a green color Pontiac, four door vehicle, bearing 1970 Ohio license QB 745, was observed parked in front of LANESE's residence, 20470 Naumann Avenue. The Department of Motor Vehicles for the State of Ohio, advised that 1970 Ohio license is listed to the Royal Machine and Tool Company, 700 East. 163rd Street, Cleveland, Ohio. At 7:22 PM, JOSEPH LANESE called

number 231-9635 and conversed with ANTHONY DELSANTER and advised that he and JOHNNY were coming over to see him. Surveillance by Special Agents of the FBI, disclosed both above described vehicles in the vicinity of the Fai-Com Club, 12113 Mayfield Road.

The affiant, based on the facts set forth above, now has reason to believe and does believe that on the premises further described hereinafter and the person of JOHN CALANDRA, there are located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices and books of account in violation of Section 371, 1084 and 1952, Title 18, United States Code.

JOHN CALANDRA's residence, 700 Quilliams, is more fully described as a two story home, constructed of brick with gray stone and white aluminum in front, with gray shingle roof. Two car attached garage on south side. Residence on northwest corner of Fenley Road and Quilliams Road.

The Royal Machine and Tool Company, 700 East 163rd, is more fully described as a two story beige brick building. The building has two doors on the side facing 163rd. Above the second story windows in the printing, "ROYAL MACHINE AND TOOL COMPANY." The left door has a storm door and the address 700 above it. The door on the right is unmarked. If you turn off of St. Clair onto 163rd, the building is located on the left side of the street on the corner at the end of the block.

Informant 1 advised on December 4, 1970, that JOHN CALANDRA, as of that date, would accept bets and lay off bets, on sports event. CALANDRA is a close associate of ANTHONY DELSANTER. CALANDRA uses his home and office on East 163rd Street for his bookmaking operation.

JOHN NARDI

On November 13, 1970, at 1:37 p.m., JOSEPH LANESE called 621-7625, and furnished person he called JOHN, with football line information he obtained from WILLIAM CIHAL, Pittsburgh, Pennsylvania. Telephone number 621-7625, according to the Ohio Bell Telephone Company, is a branch number to 621-5023, and is listed to the Vending Machine Service Employee's Local Union Number 410, in room 202, 2070 East 22nd Street, Cleveland, Ohio. Investigation by Special Agents of the FBI at Cleveland, Ohio, disclosed

that JOHN NARDI is Secretary-Treasurer of Local 410, 2070 East 22nd Street.

On November 13, 1970, at about 7:42 p.m., JOSEPH LANESE called from telephone number 486-1552 to telephone number 321-1143, which was recorded during the monitoring of 486-1552, from November 9, 1970, through November 23, 1970. According to the records of Ohio Bell Telephone Company, telephone number 321-1143 is listed to JOHN NARDI, 3924 Colony Road, South Euclid, Ohio. LANESE furnished person he called JOHN, football line information on college and professional football games according to their number on the line sheet. This information was for teams to bet on.

On November 15, 1970, at about 1:29 p.m., JOSEPH LANESE called telephone number 321-1143 from 486-1552 and talked with JOHN, and they discussed the football line. During the period of the intercepted conversations, numerous incoming and outgoing calls using the name JOHN were monitored. These conversations were with JOSEPH LANESE and consisted of wagering information and bets.

The affiant, based on the facts set forth above, now has reason to believe and does believe, that on the premises further described hereinafter and the person of JOHN NARDI there are located bookmaking records and wagering paraphernalia consisting of but not limited to, betting slips, cash, bet notices, and books of accounts, in violation of Sections 371, 1084 and 1952, Title 18, U. S. Code. JOHN NARDI's premises are further described as a one and a half story house with white siding on sides and rear, and red brick in front, green aluminum awnings, with a one car attached garage on east end of the residence. Sign on front stoop reads "NARDI's", 3924. Room 202 is located in the Vending Machine Service Employee's Local Union Number 410, 2070 East 22nd Street, which is further described as a two story brownish brick building with one front entrance, eight windows on the first floor front and ten windows on the top floor front; this building has a sign on the upper left front which reads, "Teamster Council 41". On a plaque over the front entrance is printed I. B. of T. C. and AF of L, and S and H of A. This building is located on west side of East 22nd Street between Carnegie and Prospect Streets and has a flag pole on the top.

Informant 1 advised on November 29, 1970, that JOHN NARDI continues to make book on sports events. He believed

NARDI was working out of the Union Hall near Prospect Avenue.

Informant 5 advised that as of December 3, 1970, JOHN NARDI operates a bookmaking business out of his residence and out of the Union Hall on 22nd Street just south of Prospect Avenue. He advised that NARDI accepts bets in the amounts of over one hundred dollars.

GARY STIVER

GARY STIVER has been identified by name and phone number on numerous incoming and outgoing telephone calls. LANESE, on numerous occasions, placed wagers with STIVER on football games, that he had obtained line information on from WILLIAM CIHAL, in Pittsburgh, Pennsylvania. JOSEPH LANESE and ANTHONY DELSANTER, on numerous occasions, have both exchanged wagering information in form of the college and professional including the line and horse information LANESE receives from Pittsburgh, Pennsylvania and individual betting. There are numerous calls to 795-2949. According to the records of the Ohio Bell Telephone Company, this number is listed to GARY STIVER, 1960 East 126th Street, Cleveland, Ohio. This is the address where GARY STIVER resides.

FBI surveillance has shown GARY STIVER to operate a 1969 Buick, two door, bearing 1970 Ohio license JJ 3262.

The affiant, based on the facts set forth above, now has reason to believe and does believe, that on the premises further described hereinafter and on the person of GARY STIVER and in STIVER's vehicle, there is located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices, and books of account in violation Section 371, 1084 and 1952, Title 18, United States Code. STIVER's premises are further described as a two and one half story wooden frame house faded light color, with two front entrances facing East 126th Street. Brick pillars in front support the second floor porch and it is the last residence on the left side of the street, at 1960 East 126th Street, Cleveland, Ohio.

Informant 3 advised that as of as late as December 1, 1970, that GARY STIVER was continuing to make book on sports events and that he accepted action on horses as well as sports. He advised that STIVER continues to be an agent or telephone man for another bookmaker he is acquainted

with, and has bet with, whose name is LOUIE HELLER. STIVER is still located on East 126th Street.

CHARLIE MOORE

CHARLIE MOORE has been identified by name and phone number on numerous incoming and outgoing telephone calls. JOSEPH LANESE, on numerous occasions, have exchanged wagering information in form of the college and professional football lines. During the monitoring, CHARLIE MOORE, made numerous references to his booking and taking bets. These are numerous calls to 759-9311 and 759-9594. According to the records of the Ohio Bell Telephone Company, these numbers are listed to THERESA MOORE and CHARLES MOORE, respectively, at 1198 Will-O-Wood Drive, Liberty Township, Ohio. This is the address where CHARLIE MOORE resides.

The affiant, based on the facts set forth above, now has reason to believe and does believe, that on the premises further described hereinafter and the person of CHARLIE MOORE, there are located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices, and books of account in violation of Sections 371, 1084, and 1952, Title 18, U.S. Code. CHARLIE MOORE's premises are further described as a one-story ranch style brick residence with attached two car garage located at 1198 Will-O-Wood Drive, Liberty Township, Ohio. This residence is the last house on the north side of Will-O-Wood Drive which is a dead-end street.

Informant 4 stated on December 7, 1970, that as of that time, CHARLIE MOORE continues to make book on sports activities out of his residence, on both college and professional games. He also handles some horse action. MOORE will accept bets as high as $500.00 on a single event.

RONNIE RADO

During the time of the court order, there were outgoing calls to RONNY at 531-9590 and 481-9621. Investigation by Special Agents of the FBI revealed that 531-9590 is listed to RONALD J. RADO, 19080 Newton, Euclid, Ohio, and 481-9621 is listed to RONNY's Tavern, 15610 Waterloo Road, Cleveland, Ohio, and billed to RONNY RADO.

During the period of the wire interceptions, LANESE was

in frequent contact with RADO to assist LANESE in placing bets. On November 11, 1970, at 2:12 p.m., LANESE contacted RADO at 481-9621 and they had a discussion of money that RADO owed LANESE. During the discussion, LANESE told RADO that he was not to hold any of his bets which RADO had apparently done, and now owed LANESE money because LANESE had won on the bets. During the conversation, LANESE said that he didn't care what RADO did with the rest of the bets he took, but that he was not to hold any of LANESE's bets. RADO mentioned that he had just paid LANESE $1000 and would pay the remainder tomorrow.

On November 14, 1970, at 1:16 p.m., there was an incoming call from RONNY at which time RONNY gave LANESE two teams to bet and LANESE told him to bet one of them, Virginia Tech for $200.

The following week, on November 20, 1970, at 6:13 p.m., LANESE called RONNY at 481-9621 and told RADO to get him the line. During the conversation, LANESE accused RADO of telling everyone "who and what he was doing it for", i.e., that LANESE was placing bets through RADO with other bookmakers.

On November 21, 1970, at 7:34 p.m., LANESE dialed 531-9590 and talked to RONNY who gave him the line on several games. LANESE told him to bet $2.00 on all three favorites, which in gambling terms means $200 on each game. RADO took the bets and indicated that when he placed them for LANESE, he was going to bet the same way for himself.

The affiant, based on the facts set forth in this affidavit, now has reason to believe and does believe that contained on the person of RONALD J. RADO, on the premises further described hereinafter, and in his vehicle, hereinafter described, there are located bookmaking records and wagering paraphernalia consisting of but not limited to, betting slips, cash, bet notices, and books of account, in violation of Sections 371, 1084 and 1952, Title 18, U. S. Code. RADO's residential premises at 19080 Newton, Euclid, Ohio, is more fully described as two story brown brick on first level and grey upper on sides. It has enclosed front porch and a two car wooden garage in rear on south east side of residence.

RONNY's Tavern located at 15610 Waterloo Road, Cleveland, Ohio, is more fully described as a one story brick, brown in color, windowed front, with a sign on the front which reads "RONNY's Tavern Liquor". This building is

located on the south side of Waterloo Road, and the front of the building faces the north.

On November 12, 1970, at 4:45 p.m., a black over gray Buick, Ohio license EE-8042 was observed parked in the driveway of JOSEPH LANESE's residence, 20470 Naumann. Ohio motor vehicle records reflect that EE-8042 is registered to RONNY's Tavern, Inc., 15610 Waterloo, for a 1968 Buick sedan.

Informant 2 advised on December 8, 1970, that RONNY RADO continues to operate a bookmaking business out of the bar he owns on Waterloo Road and his residence. RADO has accepted bets from him for $300.00 on football games. RADO lays off bets for JOSEPH LANESE.

CHUCKIE COMELLA

On November 13, 1970, at about 7:26 p.m., JOSEPH LANESE called from telephone number 486-1552 to telephone number 321-4664, which was recorded during the monitoring of number 486-1552 from November 9, 1970 through November 23, 1970. According to the records of Ohio Bell Telephone Company, telephone number 321-4664 is listed to CHUCKIE COMELLA, 20910 Fairmont Boulevard, Shaker Heights, Ohio. LANESE furnished person he talked with, the line on college and professional football games according to their number on the line sheet. This information was for teams to bet on.

On November 14, 1970, at about 4:30 p.m., JOSEPH LANESE called telephone number 321-4664 and conversed with person he called CHARLES or CHARLIE. They discussed their wagering and betting activity, tickets, outcome of games and his source of scores, DAN TAYLOR of the Cleveland Press Newspaper.

The affiant, based on the facts set forth above, now has reason to believe and does believe, that on the premises further described hereinafter and the person of CHUCKIE COMELLA, there are located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices, and books of accounts, in violation of Sections 371, 1084 and 1952, Title 18, U. S. Code. CHUCKIE COMELLA's premises are further described as a split level residence, reddish brick covers one half with wooden or aluminum siding, white in color covering the remainder, with black shutters on two windows, and a two car garage.

Sign on front lawn which reads "20910". This is the residence of CHUCKIE COMELLA.

EAST ONE HUNDRED EIGHTY FIFTH STREET
NEWS AND SPECIALTY MART

The East 185th Street News and Specialty Store, 656 East 185th Street, Cleveland, Ohio, has two telephones located on the premises, telephone numbers 481-0456 and 481-0457, according to the records of the Ohio Bell Telephone Company, Cleveland, Ohio.

Surveillance conducted by the Special Agents of the Federal Bureau of Investigation, Cleveland, Ohio, on September 1, 2, 9, 15, 16, 17, 18 and 24th, 1970, revealed vehicle utilized by JOSEPH LANESE, a 1969 Cadillac, green and black, bearing 1970 Ohio license QE-211, parked in the rear of the East 185th Street News and Specialty Mart. The surveillance also revealed LANESE entering and leaving the East 185th Street News frequently during that time.

Surveillance conducted by Special Agents of the FBI revealed LANESE's car parked in the rear of the news store on November 9, 10, 11, 12, 16, 17, 19, 20, 21, and 23rd, 1970, and observed LANESE either enter or leave the East 185th Street News.

On November 17, 1970, at about 4:58 P.M., JOSEPH LANESE received a telephone call at number 486-1142, which is located in his residence at 20470 Naumann Avenue, from an unknown male caller. LANESE advised the caller that he would have a "line" about 11:30 A.M. Saturday, and to call him at the store, and gave telephone number 481-0456 for the person to call on Saturday.

On Saturday, November 21, 1970, at about 11:14 A.M., JOSEPH LANESE was observed by Special Agent of the FBI to leave his vehicle, a 1969 black over green Cadillac bearing 1970 Ohio license QE-211, parked in the rear of the East 185th Street News and Specialty Store, and enter that establishment through the rear door. At 12:03 P.M. JOSEPH LANESE and two unknown males were observed leaving the East 185th Street News Store.

The affiant, based on the facts set forth above, now has reason to believe and does believe, that on the premises further described hereinafter there is located bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash bet notices, and books of ac-

count in violation of Section 371, 1084 and 1952, Title 18, United States Code. The East 185th Street News and Specialty Mart is located at 656 East 185th Street, Cleveland, Ohio, in a one-story brick building with one front and rear entrance. There is one large window in the front of the store, and in the store is an L-shaped counter to the left and rear and a news rack to the right as you enter the store. The counter has a glass top. There is a rectangle sign hanging from the front of the store which reads East 185th Street News. The building is located on the west side of East 185th Street as one faces north, and the building faces the east on East 185th Street.

Characterization of Informants

Informant Number 1 has been an informant of the Cleveland Office of the Federal Bureau of Investigation for approximately seven years and during this period has furnished information to this office in connection with gambling cases on at least twenty-two occasions, which information was corroborated by independent investigation conducted by Agents of the Federal Bureau of Investigation and found to be true and correct. This informant has personal knowledge of the bookmaking activity of Joseph Lanese in that for over an extensive period of time he has himself or personally known of others who have made wagers with or received line information from Joseph Lanese.

Informant Number 2 has been an informant of the Cleveland Office of the Federal Bureau of Investigation for approximately four months and has furnished information to this office in connection with gambling cases on at least three occasions within the past four months, which information was corroborated by independent investigation conducted by Agents of the Federal Bureau of Investigation and found to be true and correct. This informant has personal knowledge as to the scope of this operation from the obtaining of line information and placing of bets, as well as knowledge of others who bet into this bookmaking operation.

Informant Number 3 has been an informant of the Cleveland Office of the Federal Bureau of Investigation for the past eight years and has furnished information to this office in connection with gambling cases on at least twelve occasions within the past three months, which information was

corroborated by independent investigation and was found to be true and correct. This informant has knowledge of this bookmaking operation gained through his acquaintanceship with numerous individuals, who utilize the above bookmaking operation.

Informant Number 4 has provided reliable information for the past seven years to Special Agents of the Federal Bureau of Investigation and on at least 9 occasions in the past 6 months in gambling matters. This information has proven reliable on these occasions and it was substantiated and corroborated by independent investigation and by other sources who have furnished information in the past which has also proven upon investigation examination to be reliable and who are known by Special Agents of the Federal Bureau of Investigation in contact with them to be in a position to provide first-hand knowledge of the events which they relate.

Informant Number 5 has been an informant of the Cleveland Office of the Federal Bureau of Investigation for over eight years and has furnished information to this office in connection with gambling cases on at least five occasions within the past eight months, which information was corroborated by independent investigation conducted by Agents of the Federal Bureau of Investigation and found to be true and correct. This informant has personal knowledge of numerous bookmakers and betters in the Cleveland area as a result of his personal activity in betting.

Further affiant sayeth not.

/s/ Joseph G. Masterson
Signature of Affiant

/s/ Special Agent—FBI
Official Title

Sworn to before me and subscribed in my presence Dec. 11, 1970.

/s/ Clifford E. Brucy
United States Commissioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: GRAND JURY INVESTIGATION
JOHN P. CALANDRA

[Filed, Nov. 24, 3:37 PM, '71, Clerk U. S. District Court Northern District of Ohio]

PETITION FOR ORDER OF IMMUNIZATION
AND TO COMPEL TESTIMONY
BEFORE GRAND JURY
18 U.S.C. § 2514

TO THE HONORABLE JUDGE OF THIS COURT:

The United States of America, petitioner, by its attorneys, FREDERICK M. COLEMAN, United States Attorney for the Northern District of Ohio, and ROBERT D. GARY, Special Attorney, United States Department of Justice, respectfully represents to this Honorable Court as follows:

1. On August 17, 1971, JOHN P. CALANDRA was called as a witness, under subpoena, before the United States Grand Jury, which Grand Jury was then conducting an investigation of possible violations of Title 18, United States Code, Sections 892, 893 and 894.

2. On the aforesaid date, JOHN P. CALANDRA refused to answer questions relating to that investigation, invoking his privilege not to incriminate himself under the Fifth Amendment to the United States Constitution.

3. It is the judgment of the United States Attorney for the Northern District of Ohio that the testimony of JOHN P. CALANDRA is necessary to the public interest, and that this application should be made to compel his testimony after a grant of immunity.

4. The judgment of the United States Attorney for the Northern District of Ohio, expressed herein, has been approved by the Honorable JOHN N. MITCHELL, the Attorney General of the United States, who has delegated the Honorable WILL WILSON, Assistant Attorney General, to authorize in writing the making of this application, a copy of which written authorization is attached hereto as Exhibit A.

5. Facts and circumstances more particularly relating to

the pending Grand Jury investigation are set forth in the affidavit of ROBERT D. GARY, Special Attorney, United States Department of Justice, attached hereto as Exhibit B, and incorporated herein by reference.

WHEREFORE, the United States of America requests this Court to Order JOHN P. CALANDRA to answer questions which he has heretofore refused to answer, and to testify relating to all matters pertinent to the pending Grand Jury inquiry, pursuant to the provisions of Title 18, United States Code, Section 2514.

Respectfully submitted,

/s/ Frederick M. Coleman
FREDERICK M. COLEMAN
United States Attorney
Northern District of Ohio
Eastern Division

/s/ Robert D. Gary
ROBERT D. GARY
Special Attorney
U. S. Department of Justice

"EXHIBIT A"

DEPARTMENT OF JUSTICE
WASHINGTON 20530

Aug. 16, 1971

Mr. Frederick M. Coleman
United States Attorney
Cleveland, Ohio

Dear Mr. Coleman:

This is with regard to your request for authorization to seek a grant of immunity in connection with a Federal grand jury investigation of possible violations of 18 U.S.C. 892, 893, and 894.

Upon consideration of your request, I find that the testimony of John Calandra, whom you named in your request, is necessary and in the public interest. Accordingly, you are hereby authorized to seek a grant of immunity for him pursuant to the provisions of 18 U.S.C. 2514 and 2516(1)(f) in the event that he appears before the grand jury and asserts his Fifth Amendment privilege against self-incrimination.

Sincerely,

/s/ Will Wilson
WILL WILSON
Assistant Attorney General

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: GRAND JURY INVESTIGATION
JOHN P. CALANDRA, WITNESS

[Filed Nov. 24, 3:37 PM, '71, Clerk U. S. District Court Northern District of Ohio]

AFFIDAVIT

ROBERT D. GARY, having been duly sworn according to law, deposes and says as follows:

I am a Special Attorney of the United States Department of Justice, and, pursuant to a commission signed by the Honorable RICHARD G. KLEINDIENST, Deputy Attorney General, (a copy of which has been filed with the Clerk of the United States District Court for the Northern District of Ohio), I have been authorized to conduct, in the Northern District of Ohio, any kind of legal proceeding, specifically including Grand Jury proceedings, which United States Attorneys are authorized by law to conduct.

The United States Grand Jury has been conducting an investigation, in which I have regularly participated, which has disclosed substantial evidence that JOHN P. CALANDRA was operating a "shylocking" business for JAMES LICAVOLI, ANTHONY DELSANTER, and LEO MOCERI.

It was in connection with this investigation that JOHN P. CALANDRA was subpoenaed on August 17, 1971. At this time, invoking his privilege not to incriminate himself and citing the Fifth Amendment to the United States Constitution, JOHN P. CALANDRA refused to answer questions pertaining to his involvement in these Extortionate Credit Transactions.

The questions that JOHN P. CALANDRA refused to answer were propounded to him by me, and were asked as part of the investigation described herein relating to possible vio-

lations of Title 18, United States Code, Sections 892, 893 and 894.

/s/ Robert D. Gary
ROBERT D. GARY
Special Attorney
U. S. Department of Justice

Sworn to and subscribed before me this 17 day of August, 1971.

/s/ Dorninsa J. Cimino, *Clerk*
T. C. Lawford

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE GRAND JURY PROCEEDINGS, CLEVELAND, OHIO IN THE MATTER OF: JOHN P. CALANDRA	Request for Postponement of Hearing on Application for Immunity Order

[Filed Nov. 24, 11:51 AM, '71, Clerk U.S. District Court Northern District of Ohio]

Respondent, JOHN CALANDRA, by undersigned counsel, respectfully moves pursuant to rules 5(a), 5(b) and 6(d) of the Federal Rules of Civil Procedure, for a postponement of the hearing on the government's Application for Immunity Order. As grounds for this motion Respondent asserts the following:

(1) Respondent was subpoenaed to testify before a Grand Jury on August 17, 1971.

(2) When Respondent was questioned before the Grand Jury, Respondent declined to answer questions propounded by the counsel for the government on the basis of constitutional priviledge arising out of the First, Fourth and Fifth Amendments.

(3) Immediately thereafter, Respondent was served with an Application for a Grant of Immunity pursuant to 18 U.S.C.A. § 2514. Respondent had not previously had the opportunity to examine the application or to analyze the legitimacy of the reasons for the application.

(4) Substantial constitutional questions of great complexity are presented by the application in that it clearly appears that the questions which the government seeks to compel Respondent to answer were derived from evidence obtained as a result of an illegal search of Respondent's premises.

(5) The legality of the search resulting in the acquisition of the information which serves as a factual predicate for the questions propounded by the Grand Jury has been placed in issue in the case of *United States* vs. *John Calandra,* Case #71-300, now pending in this Court. A Motion to Suppress the Evidence seized in this case has

been filed and is now awaiting disposition. A copy of the motion and memorandum in support of the motion are attached hereto as Exhibit A.

(6) The time requested by Respondent is needed to enable Respondent to prepare an answer to the government's Application for Immunity Order which will fully apprise the Court of all issues relevant to the disposition of that application.

Respectfully submitted,

/s/ Gerald S. Gold
GERALD S. GOLD
and

/s/ Gerald A. Messerman
GERALD A. MESSERMAN
Attorneys for Respondent
GOLD, ROTATORI, MESSERMAN & HANNA
1100 Investment Plaza
Cleveland, Ohio 44114
Telephone: 696-6122

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF VS. JOHN P. CALANDRA DEFENDANT	Case No. CR 71-300 Motion to Suppress and Return Property Illegally Seized JUDGE GREEN

[Filed, Aug. 17, 9:50 AM '71, Clerk U. S. District Court Northern District of Ohio]

Defendant, by undersigned counsel, respectfully moves, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, that all items seized by agents of the United States government during a search of the residence located at 700 Quilliams Road, Cleveland Heights, Ohio, and a search of the premises located at 700 East 163rd Street, Cleveland, Ohio, which searches were conducted on December 15, 1970, be ordered suppressed for the use as evidence, and that all such items be ordered returned to defendant. As grounds for this motion, defendant asserts the following:

1. There was not probable cause for believing the existence of the grounds on which these warrants were issued.

(a) The Affidavit states that on November 13, 1970, one JOSEPH LANESE, a purported gambler and bookmaker, was surveyed to the Royal Machine & Tool Company, located at 700 East 163rd Street, of which company defendant is president and owner. The Affidavit does not allege the purpose of that visit. It does not allege whether or whom JOSEPH LANESE saw or spoke with. It does not allege that any unlawful transactions occurred at this time. It does not state who made the observations reported in the Affidavit. Moreover, it does not even allege that JOSEPH LANESE ever gained entrance to the premises. In short, the Affidavit is without the faintest suggestion that anything unlawful was attempted during this visit.

(b) The Affidavit states that on November 16, 1970,

a Pontiac automobile registered to the Royal Machine & Tool Company was observed parked in front of the residence of JOSEPH LANESE; that while this Pontiac was there, JOSEPH LANESE advised one ANTHONY DELSANTER, in a telephone call to the "Fai-Com Club," that LANESE and someone called "JOHNNY" would later see DELSANTER; and that the Pontiac and LANESE's vehicle were later surveyed to the vicinity of the Fai-Com Club. The Affidavit fails to state the identity of the driver of the Pontiac. It does not set forth an allegation that the driver was an employee or agent of either defendant or Royal Machine & Tool Company. It does not even allege that the Pontiac was seen in front of LANESE's residence and observed in the vicinity of the Fai-Com Club on the same day. Although the Affidavit does state that someone called "JOHNNY" purportedly accompanied LANESE, it does not state that "JOHNNY" was either observed at LANESE's residence, seen driving the Pontiac, or observed at the Fai-Com Club; i.e., there was no showing that "JOHNNY" had any connection with Royal Machine & Tool Company. Likewise, the Affidavit fails to show that Royal Machine & Tool Company was in any way involved in unlawful activities.

(c) The Affidavit states that Informant One advised on December 4, 1970, that as of that date defendant used his home and his office on East 163rd Street for his bookmaking operation. The Affidavit contains no allegations whatsoever that the informant had personal knowledge of any of the facts he reported concerning defendant. The Affidavit does not describe any underlying circumstances from which the informant might have concluded that defendant used his home or office for illegal purposes. Nor does the Affidavit contain any corroboration of this Informant's assertions that defendant used his home or his office for bookmaking.

(d) The Affidavit recites that JOSEPH LANESE placed a telephone call to defendant's home on November 15, 1970, which call "disclosed the betting relationship," and that LANESE, later on that day, telephoned defendant at the Fai-Com Club to advise him of "changes in the line." This assertion establishes no more than that defendant may have been a bettor, and does not

imply that he was a bookmaker. It has been held that the placing of bets does not constitute a violation of 18 USC § 371, § 1084, or § 1952.

2. The property seized from defendant was not that described in the warrant, bore no reasonable relationship to the purpose of the searches, and did not fall within any of those categories of items which may be seized even though not particularly described in the warrant.

(a) Both of the search warrants here related to "bookmaking records and wagering paraphernalia consisting of but not limited to betting slips and cash, bet notices, and books of records which are intended for uses in violation of § 371, § 1084 and § 1952, Title 18 USC."

(b) The items seized from defendant's place of business, generally characterized, were sports information sheets of a general circulation, address books, personal and corporate financial records, lists of telephone numbers from desk pads, and a stock certificate. The items seized from defendant's home included banking records, address books, and weapons belonging to members of defendant's family.

3. The books and papers seized from defendant's home and place of business constituted "testimonial and communicative" items which are protected from seizure by the Fifth Amendment to the United States Constitution.

WHEREFORE, defendant respectfully prays this Honorable Court to order that all physical evidence seized from defendant's home and business be suppressed, as well as any and all evidence, testimonial, direct or indirect received as a result of the within illegal searches and seiuzres. Further, that all physical items seized thereunder be returned to the defendant forthwith.

/s/ Gerald S. Gold
GOLD, ROTATORI, MESSERMAN & HANNA
By: GERALD S. GOLD
Attorney for Defendant
1100 Investment Plaza
Cleveland, Ohio 44114
Telephone: 696-6122

Service

A copy of the foregoing Motion to Suppress and Return Property Illegally Seized and attached Memorandum in support thereof was served on Robert Gary, United States Department of Justice, Organized Crime Strike Force, 526 Standard Building, Cleveland, Ohio 44113, this 16th day of August, 1971.

/s/ Gerald S. Gold
GOLD, ROTATORI, MESSERMAN & HANNA
By: GERALD S. GOLD
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF VS. JOHN P. CALANDRA DEFENDANT	Case No. CR 71-300 Supplemental memorandum in support of motion for suppression and return of property illegally seized JUDGE GREEN

[Filed Aug. 25, 4:02 PM, '71, Clerk U.S. District Court Northern District of Ohio]

I. Even if the affidavit presented probable cause to search defendant's person and/or residence, the search warrant directed to the Royal Machine and Tool Company was invalid when issued.

Assuming, *arguendo,* that the Affidavit set forth sufficient information for a finding of probable cause to search defendant's person and/or residence, probable cause to search the Royal Machine & Tool Company must be ascertained without regard to such suspicions, that is, there must be probable cause as to every particular place to be searched under a warrant. A suspected criminal does not disseminate his taint like a carrier spreads typhus. For the issuance of a valid search warrant, there must be probable cause for the belief that what is sought will be discovered at the *particular* premises to be searched. See *Camara v. Municipal Court,* 387 U.S. 523, 535, 18 L.Ed. 2d 930, 939, 87 S.Ct. 1727 (1967), 47 Am.Jur. Searches and Seizures, § 26 (1971 Supplement), and 31 ALR 2d 864-868.

This self-evident Fourth Amendment principle has been applied in numerous federal cases. *United States v. Price,* 149 F. Supp. 707 (D.C. D.C. 1957), presents not only a correct application of this principle, but also a factual complex directly on point to the instant case. Defendant Price was known as a numbers writer by an officer who had placed bets with him on seven separate dates. After he placed each bet, the officer observed the defendant proceed to one particular apartment, then to another. Search warrants were issued for both premises. The second premises were owned by an individual who had twice been arrested for numbers

operations. The court, holding that alleging the above facts did not establish probable cause for the issuance of a search warrant, stated that the affidavit revealed nothing suspicious about the premises. The court found that the officer's investigation disclosed no evidence that Price was obtaining from, or depositing at, the premises any numbers material whatsoever.

Significantly, the officer in *Price* had proof positive of defendant's violation, while here only vague suspicions existed. *A fortiori,* the instant Affidavit discloses no suspicion about Royal Machine & Tool Company. It is of no consequence whether probable cause is claimed to have attached to either defendant or JOSEPH LANESE. The presence of these gentlemen at these premises, as set forth in the Affidavit, was innocuous; the Affidavit, in all but its unsupported conclusions, reveals nothing to the contrary. The Affidavit discloses no unlawful transactions whatsoever on these premises.

In *Bynum v. United States,* 262 F.2d 465 (D.C. Ct. App. 1958), the defendant was arrested without a warrant solely because he admitted ownership of an automobile which the arresting officer knew had been used in a robbery. The court held that the arresting officer did not have probable cause for believing that the defendant had committed a felony. [Despite *Bynum's* being an arrest, rather than search situation, it pertains here; each requires the same quantum of "probable cause".] Likewise, no suspicions which might have attached to the Pontiac automobile registered to Royal Machine & Tool Company may be imputed to that firm, especially where the identity of its driver was not even alleged in the Affidavit.

II. The warrant, not particularly describing the place to be searched, countenanced a general search of Royal Machine and Tool Company.

The Royal Machine & Tool Company occupies a two-story building. The first floor, which houses numerous items of equipment and machinery, consists of approximately 13,000 square feet of working area. The second floor contains a general office area of approximately 1,500 square feet, and a smaller office occupied by defendant and his secretary. (See the attached Affidavits, E, F and G). On December 15, 1970, virtually every nook and cranny on both floors were subjected to a four hour search. The first

place searched was the second-floor general office area. Included in the search were each of the numerous filing cabinets, four desks, and even an employee's lunch bag. Subsequently, the officers entered defendant's office. There, they rummaged through the desks of both defendant and his secretary, every filing cabinet and the office safe. Contemporaneously, they searched the shop area, examining every tool box and equipment crib. This ransacking cannot be characterized as anything other than an unconstitutional general search.

An examination of the instant Affidavit should have led the Commissioner to the same conclusion. The Affidavit alleges no more than that Joseph Lanese, an alleged bookmaker, was once surveilled to the Royal Machine & Tool Company. The Affidavit does not state whether he went to the shop, or the general office, or defendant's office. To construe this allegation as presenting probable cause to search a particular place would render the Fourth Amendment an absurdity; if this is a "particular" description, it would be equally feasible to issue a warrant for every building visited by a suspected criminal, were it the White House or a shoeshine parlor, as well as every street he traversed between them.

Any contention by the plaintiff that this warrant particularly described the premises to be searched would be an argument of the most specious facility. The usual cases in which the courts have demanded greater particularity of description of large buildings are those in which a warrant describes an entire apartment building, but there is probable cause to search only one apartment. See 11 ALR 3d 1330-1347. These cases acknowledge that the scope of a warrant to search depends upon the extent of the showing of probable cause as to a particular place, and unequivocally refute the notion that simply stating a correct address constitutes sufficient particularity.

For example, in *United States v. Hinton,* 219 F.2d 324 (C.A. 7, 1955), the affidavit alleged the sale of heroin by certain residents of an apartment house, but the search warrant commanded a search of the entire building. Holding that the affidavit did not show probable cause to search the entire building, the court ruled that the warrant was not valid when issued and that the search was illegal. The court arrived at this conclusion despite its recognition of probable cause regarding the apartments of four particular

persons. The court further stated that it would have been of no consequence if these four were the only persons living in the building. The *Hinton* case may not be distinguished from the case at bar because the former involved an apartment and the latter a commercial establishment. The protections of the Fourth Amendment apply equally to both. See, e.g., *Mancusi v. DeForte*, 392 U.S. 364, 367, 20 L.Ed. 2d 1154, 1159, 88 S.Ct. 2120 (1968), and the cases cited therein. Moreover, the proscribed evil is the same: the expedient of securing a search warrant for any large structure, used by many persons for many purposes, by simply reciting the correct address and the color of its bricks.

The fact that the officers had no probable cause to search any particular part of the premises of Royal Machine & Tool Company was clearly established by their conduct during the search, described above (*Supra*, at 3).

III. The papers and documents seized at the Royal Machine and Tool Company were unlawfully seized because they were the result of an exploratory search.

Assuming, *arguendo*, that these individual papers and documents, when interpreted in combination with each other, might constitute evidence of a crime, it was unlawful for the officers to look beyond the faces of these papers and documents or to seize them without a warrant.

The latest pronouncement of the Supreme Court on this subject is found in *Coolidge v. New Hampshire*, — U.S. —, 29 L.Ed. 2d 564, 91 S.Ct. — (June 21, 1971). There the Court reaffirmed its view that the police may seize evidence in plain view without a warrant, so long as they had a valid justification for their original intrusion. But the Court also reaffirmed the principle that such warrantless seizures are permitted only within narrow limits:

> Of course, the extension of the original justification is legitimate only where it is *immediately apparent* to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. *Id.*, at —, 29 L.Ed. 2d at 583. (Emphasis added).

This same principle was applicable to *Stanley v. Georgia*, 394 U.S. 557, 569, 22 L.Ed. 2d 542, 552, 89 S.Ct. 1243 (1969)

(Stewart, J., concurring), where a search warrant was directed to evidence of bookmaking, but allegedly obscene films were seized. The criminal nature of this evidence was not in plain view; rather, it ascertained only after the officers spent some fifty minutes exhibiting them by means of a projector found in another room.

Likewise, the papers seized from the defendant at bar, could not have "immediately appeared" to be anything other than normal commercial records and forms. Under *Coolidge, supra,* the plaintiff may not assert that these records, having been integrated into some artificially constructed whole, appeared to be evidence of any crime, because the officers are strictly forbidden from fabricating such sand castles.

/s/ Gerald S. Gold
GOLD, ROTATORI, MESSERMAN & HANNA
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SERVICE

A copy of the foregoing Supplemental Memorandum in Support of Motion for Suppression and Return of Property Illegally Seized was served on Robert Gary, United States Department of Justice, Organized Crime Strike Force, 526 Standard Building, Cleveland, Ohio 44113, this 25th day of August, 1971.

/s/ Gerald S. Gold
GOLD, ROTATORI, MESSERMAN & HANNA
By: GERALD S. GOLD
Attorney for Defendant

EXHIBIT E

STATE OF OHIO }
CUYAHOGA COUNTY } SS:

AFFIDAVIT

DONALD LYNN SMITH, being first duly sworn according to law, deposes and says that he is twenty-three years of age and has been employed at the Royal Machine and Tool Company since October of 1970 with duties as a general purchasing agent and other clerical duties.

Affiant further states that on December 15, 1970, he was present in the offices of the Royal Machine and Tool Company located on the second floor of a two story brick building at 700 East 163rd Street, Cleveland, Ohio. The general office area consists of a space approximately 1,500 square feet. Located within this office area are desks for approximately four employees, blue prints and drawing tables, and numerous filing cabinets containing work orders, blue prints and other general business documents. At the north of this general business office area is a room containing old files and business documents. To the south of the general business area is another office separated by partition in which are located the desks of Mr. Calandra and his secretary.

Affiant further states that at approximately 12:10 P.M. on December 15, 1970, he was present in the general business offices of Royal Machine and Tool Company, at which time three federal agents and a Cleveland detective identified themselves and stated they had a search warrant for the premises. They searched all the desks of the employees, including affiant's lunch bag, and all files in the numerous file cabinets. At approximately 1:30 P.M. they began a search of the office adjacent to the general business office where the desks of Mr. Calandra and his secretary are located.

Affiant further states that he left work at approximately 4:10 P.M. The search was still in progress.

FURTHER AFFIANT SAYETH NOT.

/s/ Donald Lynn Smith
DONALD LYNN SMITH

SWORN TO BEFORE ME and subscribed in my presence this 25th day of August, 1971.

/s/ Rosemary Grdina Di Santo
ROSEMARY GRDINA, *Notary Public*
For Cuyahoga County, Ohio
My commission expires Apr. 21, 1975

EXHIBIT F

STATE OF OHIO
CUYAHOGA COUNTY } SS:

AFFIDAVIT

JOSEPHINE C. POPP, being first duly sworn according to law, deposes and says that she is forty-six years of age and that she has been employed by the Royal Machine and Tool Company for approximately twenty-five years as a tool crib attendant.

Affiant further states that her duties include the issuance of tools to the various employees and the collecting of same from them. Affiant states that her work area is located on the first floor of the east side of the plant located at 700 East 163rd Street. The remaining first floor of the plant contains numerous pieces of heavy machine equipment.

Affiant further states that on December 15, 1970, during the working hours, in the afternoon, a federal agent entered the tool crib area and asked questions concerning what was located in various drawers and cabinets and thoroughly searched drawers and cabinets which contained tools and other equipment.

FURTHER AFFIANT SAYETH NOT.

/s/ Josephine C. Popp
JOSEPHINE C. POPP

SWORN TO BEFORE ME and subscribed in my presence this 25th day of August, 1971.

/s/ Rosemary Grdina Di Santo
ROSEMARY GRDINA, *Notary Public*
For Cuyahoga County, Ohio
My commission expires Apr. 21, 1975

EXHIBIT G

STATE OF OHIO
CUYAHOGA COUNTY } ss:

AFFIDAVIT

LOUIS A. KOSAR, being first duly sworn according to law, deposes and says that he is forty-eight years of age and has been employed as an all around machinist with the Royal Machine and Tool Company for approximately twenty years.

Affiant further states that he operates various pieces of equipment and machinery located on the first floor of the Royal Machine and Tool Company at 700 East 163rd Street. The first floor area which houses numerous pieces of equipment and machinery consists of approximately 13,000 square feet of working area.

Affiant further states that while employed during the afternoon hours of December 15, 1970, federal agents thoroughly searched the entire plant area including a desk within a room which is air controlled due to the special nature of the heavy machinery located therein.

FURTHER AFFIANT SAYETH NOT.

/s/ Louis A. Kosar
LOUIS A. KOSAR

SWORN TO BEFORE ME and subscribed in my presence this 25th day of August, 1971.

/s/ Rosemary Grdina Di Santo
ROSEMARY GRDINA, *Notary Public*
For Cuyahoga County, Ohio
My commission expires Apr. 21, 1975

EXHIBIT I

AFFIDAVIT

NORTHERN DISTRICT
OF OHIO

I, THOMAS J. RARDIN, Special Agent, Federal Bureau of Investigation, having been duly sworn, state:

On December 15, 1970, at the time of the search of the Royal Machine and Tool Company, 700 East 163 Street, Cleveland, Ohio, I was aware that an investigation into possible violations of Title 18, United States Code, Sections 892, 893 and 894 (Extortionate Credit Transactions), was being conducted by the United States Attorney's Office for the Northern District of Ohio, and that DR. WALTER C. LOVELAND was a victim of this shylocking operation.

/s/ Thomas J. Rardin
Signature

Sworn to before me and subscribed in my presence this 23d day in August 1971.
Mildred H. Eakin
Notary Public

My commission expires Dec. 26, 1972

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, vs. JOHN P. CALANDRA, DEFENDANT.	Criminal Action No. CR 71-300

[Filed Nov. 22, 10:13 AM, '71 Clerk U.S. District Court Northern District of Ohio]

PROCEEDINGS BEFORE HONORABLE FRANK J. BATTISTI, CHIEF JUDGE, AT 10:25 A.M., FRIDAY, AUGUST 27, 1971.

APPEARANCES:

On behalf of the Plaintiff:

MR. ROBERT D. GARY and
MR. STEVEN R. OLAH,
Assistant United States Attorneys.

On behalf of the Defendant:

GOLD, ROTATORI, MESSERMAN & HANNA, by
MR. GERALD S. GOLD and
MR. ROBERT J. ROTATORI.

[2] FRIDAY, AUGUST 27, 1971.

THE COURT: Mr. Gold and Mr. Rotatori.

MR. ROTATORI: If it please the Court, we are here today on a continued hearing in regard to our motion for a continuance filed with this Court last week concerning the application of the Government for an order immunizing Mr. John Calandra.

Now, the issues raised in our application for a continuance were, number one, that sufficient notice was not given under the Federal Rules.

That problem has been cured. The continuance of the hearing did provide us now with sufficient time within the rules to present our objections to the Court.

Now, regarding the second and the next ground for the argument in behalf of the request for the continuance, the application presented to this Court shows on its face that the questions asked of Mr. Calandra before the Grand Jury and the questions for which immunity is being requested are questions which the Government obtained the basis for as a result of a constitutional violation upon Mr. Calandra personally, that constitutional violation being that he and the business premises of Royal [3] Machine and Tool Company, of which he is the principal officer, were subject to an unreasonable search and seizure under the Fourth Amendment in that the affidavit used in support of the search of those premises did not contain sufficient evidence upon which the Magistrate, or at this time, the Commissioner, could deduce that there was probable cause to believe that those premises were being used for a violation of Federal law, specifically, gambling in violation of Sections 1952 and 371, and that on those premises were located instrumentalities, contraband, or fruits of those particular crimes.

Now, in addressing ourselves first to the q' estion of the propriety of the Court's hearing at this time, since the Government has raised that question in their response to our memorandum, we are principally relying on, as the Court knows, the case In the Matter of: Joques Egan. This case was decided on April 5, 1971 by the Third Circuit sitting en banc.

The question presented there was Sister Egan had been immunized before a Grand Jury in Harrisburg, Pennsylvania. Her counsel at that time objected to the immunization order on the basis that certain [4] questions propounded to her before the Grand Jury were the result of illegal electronic surveillance of her. The Court ordered the witness to testify in the Egan case.

She continued to refuse to testify and was held in contempt by the Court.

In the contempt hearing, the counsel for Sister Egan again raised the question of the propriety of the propounding of questions before the Grand Jury which were the fruits of an illegal electronic surveillance.

The Court of Appeals for the Third Circuit sitting en banc decided that the District Court was required to conduct a hearing on that question. Their decision was on the

question of whether the questions propounded in the Grand Jury were the result of electronic surveillance or not, whether Sister Egan's personal rights had been violated.

Now, they buttressed their decision on two grounds primarily. First of all, their decision was buttressed on the fact that under the exclusionary rules decided by the courts under the Fourth Amendment, that if there was a violation of a Fourth Amendment right and that violation was the basis for the substance of the questions being asked the [5] witness before the Grand Jury, that she had a right to have that issue adjudicated prior to being compelled to answer.

Secondly, the Third Circuit decided that Congress, in the enactment of the Omnibus Crime Bill of 1968 which authorized the Government, under certain conditions, to obtain court-ordered wire taps and eavesdropping, Congress stated specifically in Title 18, Section 2515, a part of the Omnibus Crime Bill, that any evidence obtained in violation of that section of law which set up the procedures for obtaining court-authorized wire taps, any evidence obtained in violation of those provisions could not be presented to any governmental body, including a Grand Jury, and therefore, the Third Circuit decided that the District Court could not violate that specific statutory provision by compelling the witness to answer questions, because the answering of those questions would, in effect, introduce into that proceeding, the Grand Jury proceeding, evidence obtained in violation of that statutory provision.

THE COURT: Let me ask one question.

If immunity is granted, I assume from your argument that your witness will refuse to answer in any event; is that correct?

[6] MR. ROTATORI: That is correct, your Honor. I represent that to the Court, that we feel again we would have the opportunity to raise these issues in a contempt hearing.

THE COURT: All right.

MR. ROTATORI: And that was my next argument. This hearing is not premature.

THE COURT: What it goes to, of course, is whether we are premature.

MR. ROTATORI: In the sense that we are representing to the Court that this argument would be made again. There

would be no answering of questions on the basis of the propositions presented to the Court here.

THE COURT: Then it is clear on the record, then, that if immunity is granted, he will not answer, he will refuse?

MR. ROTATORI: That is correct, your Honor.

THE COURT: All right.

MR. ROTATORI: Now, the Government's argument basically to the denial of a hearing on these questions at this time or in a contempt hearing were, I think, fairly disposed of by the Third Circuit.

[7] Many of the cases the Government states in its memorandum are situations where a witness, before the Grand Jury is attempting to raise third-party rights, says, "I will not answer that question, because that question was the result of a constitutional violation upon someone else, and that is where you have got the information upon which you are asking me these questions."

This is not the case here. We are contending and are prepared to show that the constitutional violation of which we complain was perpetrated upon the witness himself, the person who is now raising that question. I think that is clear.

THE COURT: Yes, that is clear. Yes.

MR. ROTATORI: In addition, the questions we raise are not ones which in any way would impede the progress of the Grand Jury. These are questions, as the Third Circuit points out, which can be speedily disposed of by virtue of representations of both parties and, on the law, presented by both parties.

So I don't feel that this proceeding in any way would impede the orderly administration of Grand Juries and the orderly investigatory process of a Grand Jury.

[8] THE COURT: Is this not really the only time that this matter can be raised, because this witness is going to be, at least on the representation of the Government, immunized and he would not be indicted?

MR. ROTATORI: That is correct, your Honor. He would never be a party defendant to any criminal proceeding and, therefore, would not be in a position to raise his rights.

Now, certainly, there are decisions which say that when an indictment is not pending, a person can file a motion to suppress evidence, for suppression and return. It then takes the nature of a civil case.

But since the Government is moving first here, the Government is moving to obtain the benefits of an alleged constitutional violation, and if the Government is allowed to proceed further, the very reason for moving to suppress would be gone, the violation would have occurred.

So in that sense, the Court is quite correct. This is the only time Mr. Calandra can effectively move for the protection of his constitutional rights.

THE COURT: Then I would suppose the Government can search under an obviously insufficient [9] or bad warrant, perhaps even no warrant, if we held this, for example, to be premature and did not afford a hearing at this juncture.

MR. ROTATORI: This is the problem that faced the Third Circuit, and it was the principal basis upon which the Third Circuit remanded the matter to the District Court for the holding of a hearing.

The Third Circuit was very much troubled with the same question this Court raises. They were troubled over the fact that if a hearing were not afforded, the Government could continue to use the fruits of unconstitutional activity and——

THE COURT: We would, in effect, be formulating such a rule.

It is probably superfluous to ask, but the Fourth Amendment would seem to be designed to keep enforcement officers in line; correct?

MR. ROTATORI: That is correct, your Honor. That is the very basis of the exclusionary rule decided in the case of Mapp vs. Ohio. That was the purpose of the exclusionary rule as the Supreme Court stated. It was to pronounce an effective procedure whereby law-enforcement officers would be discouraged and prevented from violating constitutional [10] rights and attempting thereby to use the fruits gained from that violation.

The Supreme Court stated in that case that this is the only effective means they have. Prior to the Mapp case, as your Honor will recall, the only effective means a person had of bringing forward his violations upon constitutional rights, his personal constitutional rights, was to bring a civil action against the investigative officers involved.

The Supreme Court said historically, this has proven to be inadequate. It hasn't stopped in the slightest way in-

vestigative officers and police officers from violating the Fourth Amendment.

Therefore, they decided that the exclusionary rule, as a matter of historical significance, was necessary and that any evidence obtained in violation of a constitutional right could not be used in any proceeding, to use the words of Silverthorne.

THE COURT: At this point, let us go to the sufficiency and scope of the warrant.

MR. ROTATORI: Yes.

THE COURT: Then if I have to inquire further along this line after hearing from the Government, I will.

MR. ROTATORI: Basically, it is the [11] contention at this time, your Honor——

THE COURT: I would assume pretty much the substance of what you will argue is contained in your brief anyway.

MR. ROTATORI: That is correct, your Honor.

THE COURT: On the questions you are now arguing.

MR. ROTATORI: Yes.

We raise the constitutional issue in regard to the search of the offices of the Royal Machine and Tool Company.

Your Honor, in this investigation, regarding search warrants issued connected with John Calandra, there were three search warrants. One was issued for the search of his person, one was issued for the search of his personal residence—and these facts are all admitted by the Government—and one was issued for the premises located at 700 East 163rd Street, the building of the Royal Machine and Tool Company, which Mr. Calandra is an employee and an officer of that company.

Now, it is fundamental, it is axiomatic that each search warrant in this case relating to Mr. Calandra must be supported by a sufficient showing [12] of probable cause. That, of course, is the wording of Rule 41, and it is a constitutional requirement as pronounced by the Supreme Court.

Now, the problem in this case in regard to the sufficiency of these warrants is the fact that the same affidavit, identically the same affidavit, was used in support of each of these three warrants.

I think, therefore, we must examine each warrant individually and the affidavit, that very same affidavit, as it relates to each warrant.

Whether or not there was probable cause for the search of John Calandra personally is not being raised in this proceeding.

Whether or not there was probable cause for the search of his personal residence is not being raised in this hearing.

The question being raised in this hearing, which is relevant to the hearing because the questions asked in the Grand Jury were derived from the evidence obtained from the search of the Royal Machine and Tool Company, is whether that same affidavit used to support two other warrants is sufficient to establish probable cause in regard to the search of the Royal Machine and Tool Company.

What does the affidavit relate in regard to [13] establishing whether or not there is probable cause to believe that a crime is being committed on the premises of the Royal Machine and Tool Company, that there are instrumentalities, contraband, or fruits of those gambling crimes on the premises of Royal Machine and Tool Company?

The quantum of probable cause must be weighed in considering the Royal Machine and Tool Company and the affidavit's sufficiency in regard to Royal Machine and Tool Company.

The affidavit really states only two things in regard to Royal Machine and Tool Company as to whether there is probable cause to believe there are instrumentalities and fruits of gambling crimes on those premises. It states, one, that an informant advised on 12/4/70 that John Calandra, as of that date, would accept bets and lay off bets and that Calandra uses his home and office at East 163rd Street for his bookmaking operation. That is what Informant 1 states in regard to Royal Machine and Tool.

In addition, there is the statement in the affidavit that an automobile registered to Royal Machine and Tool Company was seen in front of the home of Joseph Lanese.

[14] The only other remaining factor in this voluminous affidavit relating to Royal Machine is that the automobile registered to Joseph Lanese was seen on one occasion in front of the premises occupied by Royal Machine and Tool Company.

So we have two unoccupied automobiles, no description as to who was driving those automobiles on the particular occasion, being seen once in front of the premises of Mr. Lanese and once in front of the premises of Royal Machine

and Tool and the statement of the informant. That is all we have as to the sufficiency of probable cause concerning the search of Royal Machine and Tool.

Now, obviously, I think the fact that an automobile is seen in front of a person's home is, as the Supreme Court determined in Spinelli, a seemingly innocent occurrence which the Government is attempting to use to buttress probable cause.

As to the question of the informant's statement, the Government presents a unique argument in regard to this informant. They say the informant presented personal information in regard to Joseph Lanese, that the informant personally bet with Lanese and, therefore, he has presented underlying circumstances, underlying facts to justify his [15] reliability and his belief in line with Spinelli and the recent Harris case.

But the Government is attempting to use that personal contact with Lanese to buttress the same informant's information in regard to Calandra, for in regard to Calandra, the informant states nothing as to how he knows Calandra is using his business premises for bookmaking activity. He merely makes the statement that he is using the premises for bookmaking activity.

On page 4 of the Government's brief, they state "For the most part, the courts have found underlying circumstances sufficient to justify the reliability of the informant when he has taken part in the act he reports."

Then they go on to say that "The informant had personal knowledge of the bookmaking activity of Lanese."

Of what value is that, that personal connection and contact between the informant and Lanese as it applies to Mr. Calandra?

If we were to accept that argument, your Honor, it would lead us to this conclusion. If an informant states that he has personal contact with an individual and then this individual, in some means [16] or manner, has contact with a third person, then, the Government argues, the reliability of the informant is established as to the third person.

It would present this type of situation, your Honor, and I think this analogy is appropriate. Let's assume that Mr. Gary knows and even bets with an individual who is involved in interstate gambling activity. Obviously, Mr. Gary has a home, so he goes to his residence. He has a

place of employment in the Standard Building. Now, let's assume that this individual parked his car in front of the Standard Building on one occasion and there is probable cause to believe that this other individual, Mr. Lanese, was involved in bookmaking and interstate gambling activity.

Would that justify the Government in obtaining a search warrant for the offices in the Standard Building which Mr. Gary works in?

I don't believe so.

The same would apply, for example, if there were probable cause to believe that I personally was involved with an individual in interstate gambling activity. That individual would come to my law office or his car would be seen in front of my law office.

[17] Does that mean that there is probable cause to believe that I'm involved in bookmaking activity and, more important than that, that the law office is used in bookmaking activity?

And then to the next question, the scope as it relates to probable cause, because I don't believe we can divorce scope of a warrant from probable cause.

If this individual for which there is probable cause to believe he is involved in interstate gambling, his automobile is seen in front of my law office, would there be probable cause to search the entire law office, the entire business establishment? Not just my personal office, but the entire establishment, a search of everyone's desk on those premises, a search of every file cabinet on those premises, whether it be my personal file cabinet or not?

This is the situation we have presented in regard to the search of Royal Machine and Tool Company.

THE COURT: Where did they obtain the documents that the Government did obtain pursuant to the search in the Royal Machine and Tool Company? Where were the documents?

MR. ROTATORI: I believe these documents [18] were obtained from the business portion of the premises, where the clerical work is done.

THE COURT: Were they in something? Were they in a vault or something?

MR. ROTATORI: They were in a filing cabinet, your Honor. The top drawer of this filing cabinet contains a combina-

tion lock for the top drawer. The other three filing cabinets contain key locks. I believe the Government termed it——

THE COURT: In other words, these documents just weren't spread out on a table somewhere?

MR. ROTATORI: No, they were not, your Honor. It necessitated the opening of these filing cabinets with a key and also, I might add, the calling down to the office of the secretary who had the combination to the top drawer.

THE COURT: They were not something in plain view?

MR. ROTATORI: No, your Honor. I would not think it was in plain view.

In addition, the entire premises of Royal Machine was searched.

Now, the offices are on the second floor, and I think this is significant in determining whether they had a proper description of where to search as [19] it relates to probable cause.

They searched the entire first floor, which is some 13,000 to 15,000 square feet occupied with heavy equipment machinery for tool and die making.

They also searched the tool crib on the first floor and went through virtually every drawer in that tool crib.

Then up on the second floor where the business offices are located, the clerical staff, everyone's desk was searched there, including each employee's personal desk. The lunch of an employee was searched.

THE COURT: The lunch?

MR. ROTATORI: A lunch bag, his lunch bag.

Also, every file in that clerical space was searched in the sense that some disregarded old files that had been locked up in a storeroom, that area was ordered opened and a search of all of those records, a search of all the blueprints pertaining to the equipment to be made and the other work of Royal Machine was searched.

Now, I think this is relevant as the Supreme Court has used it in determining whether we are involved here with a search for specific items for which there has been probable cause delineated in [20] the affidavit or whether we are involved with a general exploratory search for anything and everything. The Supreme Court has made ref-

erence in numerous cases to the extent of the search, both geographically and timewise.

And by the way, this search took place over a four-hour period by four agents. That is significant because the Supreme Court has looked to these factors to determine whether or not a search is violative of the scope requirements of the Fourth Amendment.

Generally, if the probable cause is specific to believe that certain material, instrumentalities, or contraband is in a particular place, the Supreme Court has found from experience the search will be very short in duration if that probable cause is specific and indeed good and that the scope geographically of the search will be very limited, and they say this relates back again to probable cause, because if there is cause to believe that there is something there, sufficient cause under the Fourth Amendment, they are going to be able to go there and get it quickly without rummaging throughout the entire premises. I think those factors are significant in determining the scope of the search as it relates to sufficiency of probable cause.

[21] Now, the question that the Government raises I assume is an argument where, first of all, the Government contends that they had probable cause to search Royal Machine and Tool.

I think it is clear that they did not.

But they say once on the premises of Royal Machine and Tool, they ran across the records seized, the stock certificates and other financial records, account cards and cognovit notes. They say these were evidence of a crime and that this evidence was in plain view.

Now, the Supreme Court just recently in the Coolidge case, decided as one of the last cases this term before it recessed, had an opportunity to go over the plain-view doctrine, and the requirement they stated concerning plain view is just that. It must be in plain view and it must be immediately apparent and immediately in plain view. It is a question of immediacy.

Now, the plain-view doctrine presents no problem, your Honor, when an agent walks in under a valid search warrant and he sees on the desk a hundred pounds of heroin. There is no question that this is contraband. It is in plain view. Or he sees the fruits of crime. He sees the stolen furs [22] right there.

This is something in plain view. This is something which immediately the agent can recognize, and therefore, the Court has extended the scope of the search warrant to the extent of allowing him to seize this.

Now, what we have here is the examination, as the Government admits in its own response, of 106 cards, and I assume each one was examined. Now, when you have to sit down and examine 106 cards and examine the number of stock certificates that they examined, this can be hardly considered in plain view.

This is much like the Supreme Court case of Stanley vs. Georgia, decided in 1970, where again agents went in to an establishment looking for gambling records and paraphernalia, Federal agents, and they came across several reels of film. They took the reels out, unraveled them, looked at them, then ran them on the projector in the office.

The Supreme Court said this was not a seizure of evidence incident to the executing of a valid search warrant because this was an examination. This didn't have the immediacy that we are talking about when we speak of plain view.

[23] We feel for those reasons, your Honor, that, first of all, there was not probable cause for the search of Royal Machine and Tool Company, that assuming arguendo that there may have been, then the seizure of documents of which we complain was outside the scope of the warrant and outside the scope of any exceptions decided by the Supreme Court.

THE COURT: Mr. Gary.

MR. GARY: Your Honor, with the Court's permission, since Mr. Olah and I have briefed separate questions to be presented to this Court, I would ask permission to respond to the question of whether or not the hearing is timely at this point and that Mr. Olah be permitted to respond to the question of the validity and scope of the search warrant.

THE COURT: All right.

MR. GARY: It is the Government's position that the real issue before this Court is the right of a third-party witness to refuse to testify before a Grand Jury under a grant of immunity because of the nature of the evidence before the Grand Jury.

The position of the United States is that regardless of the validity of the search and seizure [24] question, that

the immunized witness has no constitutional right to object to testifying before the Grand Jury at this time.

THE COURT: If you went in with no warrant, would he have any right to be in this court now contesting an examination before the Grand Jury on the basis of evidence that you obtained?

MR. GARY: Your Honor, under the theories of the Second and Ninth Circuit, the witness would have no right under the Fourth Amendment to contest this under a motion to suppress, but would have that right——

THE COURT: To sue the Government.

MR. GARY: —would have the right to sue the Government and for a motion to return.

It is the Government's position that Mr. Calandra at this time has filed a motion to suppress which is not properly brought because it is not in connection with a criminal case in regard to the shylocking records and that his proper motion at this time would be a motion to return and not to suppress, and I believe this has been supported by the Sixth Circuit in the United States vs. Curry.

THE COURT: You mean that when you are faced with a pleading question here, he didn't file [25] the right motion?

MR. GARY: Correct, your Honor.

THE COURT: Can I consider this a motion to return the evidence at this time?

MR. GARY: Your Honor, if you consider Mr. Calandra's motion as a motion to return the evidence rather than a motion to suppress, I think even Egan would indicate that there was no standing. Even under the theory of Egan, Mr. Calandra would have no standing at this time.

THE COURT: Why?

MR. GARY: Because Egan held that he had standing because it was directed against him in regard to the Fourth Amendment.

A motion to return has no Fourth Amendment issue involved in it.

THE COURT: Well, on the basis of your argument, you can send your agents in anywhere. You can go out and search my home this afternoon with no warrant, and the only remedy I have, then, is to file a lawsuit against you or file a motion for a return of whatever you took, but I cannot prevent you from using whatever you have obtained in a Grand Jury in questioning in regard to it.

MR. GARY: At that time, your Honor, [26] however, once an indictment had been returned, then your right would arise in a criminal matter.

THE COURT: Oh, yes.

MR. GARY: And Fourth Amendment rights would arise at that time.

Mr. Calandra is asserting, I take it, a right of privacy.

THE COURT: But since you are going to immunize this man, there would be no time in which he can raise this issue except, as you say, by virtue of a motion to return.

MR. GARY: Your Honor, we are getting into important matters of policy.

THE COURT: Yes, we certainly are. In other words, the policy that the Government ought to enforce with regard to the conduct of law enforcement officers in the United States.

MR. GARY: The risk the Government runs, your Honor, and the deterrent to law enforcement is that should the Government seize evidence in violation of the Fourth Amendment, no conviction can be brought. That is the deterrent.

But on the other hand, if Mr. Calandra's position is accepted, the Grand Jury would be rendered virtually useless as an effective investigatory tool.

[27] THE COURT: Let me ask you this. Do you agree that the Fourth Amendment was designed to keep enforcement officers in line, so to speak?

MR. GARY: Yes, your Honor. I agree with that.

THE COURT: I would think one would have a pretty hard time sustaining your——

MR. GARY: But the manner in which the Fourth Amendment, in regard to this situation, keeps enforcement officers in line is that once an indictment has been brought and the evidence has been obtained in violation of the Fourth Amendment, it cannot be used. There's no possible way to obtain a conviction. That is the deterrent.

On the other side of the question, if the Government is not allowed to examine third-party witnesses before the Grand Jury without a whole, entire hearing, then the Grand Jury would be delayed for months and would be rendered ineffective as an investigatory tool.

THE COURT: Let's make the assumption that you have a bad warrant.

What manner of policy are we adhering to in the United States if we permit law enforcement officers to go in and search unlawfully one's [28] premises and obtain property, documents belonging to that person? Do you think that our policy ought simply to extend to the ability on the part of that party to file a lawsuit and exclude from whatever policy considerations are before us the ability to prohibit the Government from using the fruits of that search in any way?

MR. GARY: Your Honor, if I may be allowed to develop my——

THE COURT: Let me put it another way.

You wouldn't go in and take it on a bad warrant if you knew you couldn't use it. That would stop the illegal searches.

But if you knew that all that was going to happen was that sometime later, he could file a motion for a return of the documents or file a lawsuit against FBI agents or those who directed him, there would surely be encouragement to continue to violate the Fourth Amendment by way of illegal searches.

It would seem to me the policy would just be abominable.

MR. GARY: If I may be allowed to develop my argument.

The Government, of course, is aware that there [29]] is a split between the Second and Ninth Circuits and the Third Circuit.

THE COURT: So am I.

MR. GARY: And later on, I would like to point out that the Supreme Court has recently dealt with this issue. In fact, on August 16 of this year.

The courts have held in the Second and Ninth Circuits that the right of the witnesses arises after the defendant has been indicted.

All the cases cited in the Defendant's brief, such as Egan, deal solely with illegal electronic surveillance.

There is no such issue before this court. We are talking about the validity and scope of a search warrant.

Egan involved, as we said, illegal wire tapping. The Court's decision in Egan went off on three grounds and,, in fact, was decided upon 18 U.S.C. 2515, which prohibits the use of illegal electronic surveillance in a Grand Jury.

The Government conceded, prior to the hearing, that there was illegal electronic surveillance.

The Court touched upon 2518(10)(a), which deals again

with electronic surveillance and which is not [30] in question here.

What is in issue is the dicta in Egan and in regard to the Fourth Amendment rights of the sister. As I have said, there is no illegal electronic surveillance here, so 2515 does not apply, nor does 2518(10)(a).

THE COURT: Well, we can analogize.

MR. GARY: Well, I think, your Honor, it really comes down to the Fourth Amendment argument, which in that case was based upon Silverthorne, and even the dissent in Egan, which was a strong dissent, said that Silverthorne has never been extended to one who is not a party.

Mr. Calandra is not a party in the sense that the Grand Jury investigation is not directed against him. He will not be a party in a criminal proceeding.

THE COURT: That is what makes it very important, it would seem, that he be heard now, because he is not going to be a party, he is not going to be indicted if you immunize him.

MR. GARY: I think the Supreme Court, in a minute decision, recognized the balancing question involved here. In Russo vs. United States, which was decided on August 16, 1971, the question [31] had been presented as to what was the standing of a witness to inquire into illegal electronic surveillance. The witness had been immunized, had refused to testify, and was held in contempt.

The question came before the United States Supreme Court on a stay of the contempt hearing, and the Court said that there must be some credible evidence that the prosecution violated the law before the judicial machinery is invoked to delay a Grand Jury proceeding. Apparently, the Supreme Court intended not to halt a Grand Jury proceeding every time a witness raised the question of the validity of the search warrant on a court-authorized wire tap.

In effect, your Honor, that answers your question. In Silverthorne, they had virtually no search warrant. In Egan, the Government conceded there was illegal electronic surveillance.

Yet Mr. Calandra is asking the Court here to take one step further. He is asking the Court to make a decision which is based neither on law nor reason to halt the Grand

Jury proceeding because the witness objects to the validity of the search warrant.

If the courts were to rule in favor of Mr. [32] Calandra, every time a witness appeared before the Grand Jury, he could refuse to testify based upon the Fourth Amendment. The Court would then be obligated to resolve the search and seizure question prior to the taking of any Grand Jury testimony.

THE COURT: If there was a serious question of an illegal search and seizure, why not?

MR. GARY: Your Honor, regardless——

THE COURT: I don't think the Supreme Court says we can't do that. I think they say precisely the opposite, that we can do it, we can inquire into it.

MR. GARY: Your Honor, regardless of whether or not there was a serious question, if there was any question, if there was a search warrant, the Court would be obligated to hear it.

How would you make a determination as to whether or not it was a serious question in advance? That would require a hearing every time.

If then the decision was adverse to the witness, the witness would have a right to appeal. It is thus conceivable that every time a witness appeared before the Grand Jury, the Government would be involved in a delay of a month or possibly a year.

The decision of this Court in advancing the [32] theory of Egan to search warrants in a Grand Jury investigation would tie up the courts in pointless litigation and, in effect, destroy the investigatory nature of the Grand Jury.

Even if electronic surveillance or a search warrant were not in issue and there were no grounds for asking questions based upon a search warrant before the Grand Jury, the witness would still, your Honor, if the Court should rule in favor of Mr. Calandra, have the right to come before this Court to have a hearing as to whether or not the questions were based upon a search warrant.

That, your Honor, would place the Government in the irreconcilable position of having to come forward with the evidence it intends to use before the Grand Jury prior to the time it was required to ask the questions of the witness.

Even the Court in Egan recognized the dangers that were involved in its decision, and the majority decision made

every possible effort to limit the case to a situation involving illegal electronic surveillance in which they were facing a flat constitutional prohibition.

The United States submits——

THE COURT: What is the difference [34] between illegal electronic surveillance and an illegal warrant, insufficient warrant, or other illegal searches?

MR. GARY: The difference is, your Honor, where the Government comes forward and concedes illegal electronic surveillance, that it has already been litigated. The Government has conceded. You are at that point faced with a flat prohibition.

The Government is not agreeing with the decision in Egan but is saying even the decision in Egan is not authority for taking the next step to say that every time there is a question in regard to a search warrant, that a witness has a right to come in and refuse to testify before the Grand Jury.

But the United States, your Honor, would urge that this Court follow the decisions in the Ninth and Second Circuits, particularly in light of the fact that the United States has petitioned for certiorari in re Egan.

Thus, your Honor, it is the position of the United States that regardless of what the determination of the search and seizure question which is pending in the motion submitted by Mr. Calandra before Judge Green is, that the witness Calandra should be required to testify at this time.

That is all, your Honor. At this time, I will turn the floor over to Mr. Olah.

THE COURT: I am going to take a 10-minute recess before I hear Mr. Olah.

(Recess taken.)

THE COURT: Mr. Olah.

MR. OLAH: Your Honor, if it please the Court, the Government contends that the affidavit in support of the search warrant issued in this case contained sufficient probable cause for the search of the premises of the Royal Machine and Tool Company.

The affidavit in question contained information derived from three separate sources: Court-approved electronic surveillance, physical surveillance as conducted by Special

Agents of the FBI, and information supplied to the FBI by a confidential, qualified informant.

During the Course of the lawful interception, Mr. Calandra was identified by name and number during numerous conversations with Joseph Lanese. The majority of these conversations were gambling-related.

Mr. Calandra and Mr. Lanese had a particular [36] conversation in which bets on seven games were discussed, five of which they agreed upon that they had won.

Also, a conversation was overheard in which Mr. Lanese told Mr. Calandra to add Detroit to the list of wagers.

THE COURT: That may be evidence that he is making a bet. But is that evidence that he is operating and conducting a bookmaking operation?

MR. OLAH: Well, I feel that the fact that Mr. Calandra and Mr. Lanese discussed seven wagers and Mr. Calandra was told to add a team, a particular team at a particular date, would indicate—at least there is probable cause to believe that Mr. Calandra might be accepting wagers for individuals other than himself.

In addition to the telephone conversations, the physical surveillance during the period of interception and simultaneous therewith placed Mr. Lanese at the Royal Machine and Tool Company and placed the automobile which is registered to Royal Machine and Tool Company at the residence of Mr. Lanese.

During this surveillance, Mr. Lanese was overheard telephoning another individual in the operation and advising this person that he and Johnny would be [37] coming over to see him at this time.

Finally, the affidavit contained information from an informant of the Federal Bureau of Investigation.

Now, the defendant has not raised any objections as to the qualifications of the informant, so I will direct my argument to the second prong of the Spinelli-Aguilar test; that is, the information which this informant gave to the Federal Bureau of Investigation.

This information——

THE COURT: Wait a minute.

They don't know who the informant is, do they?

MR. OLAH: I would think that they do not.

THE COURT: Very well. It would be rather difficult for them to raise any questions with regard to his qualifications.

MR. OLAH: Well, as the qualifications were set out in the affidavit, your Honor, reciting that he had been an informant for so many years, had given information on so many occasions, and this information had been corroborated by independent investigation by the FBI, that particular set of remarks was not questioned by the defense.

[38] So this informant stated that he had placed wagers with Mr. Lanese and also that as recently as December 4, 1970, one week to the day before the warrant was obtained, he knew as of that date that Mr. Calandra was accepting wagers and lay off wagers at Royal Machine and Tool Company specifically.

THE COURT: But he didn't say that he ever made a bet with Mr. Calandra, did he?

MR. OLAH: No, he did not. He did not specifically enumerate that he had made a bet with Mr. Calandra.

THE COURT: Not that he didn't specifically enumerate. He didn't say it?

MR. OLAH: He didn't say it.

THE COURT: Also, he didn't say anything about anybody else making a bet with Mr. Calandra, did he?

MR. OLAH: No, he did not. That is true.

Now, the actual dealings of an informant with certain defendants as a source for showing that the information received was reliable has come up several times in reported cases in the past. In particular, United States vs. Rich, Fifth Circuit, concerned itself with an informant who purchased obscene films [39] from the defendant and the police officer who personally observed some of these purchases. The informant added that the defendant said that he was going to New York to check on a shipment of some films.

Now, this shipment was the subject of the seizure in question in Rich, and the Court found that the statements in the affidavit were in sharp contrast to those in Spinelli, particularly because the informant's information was based upon personal observations, including his prior purchases.

In the recent Supreme Court decision in United States vs. Harris, the Supreme Court was presented with an informant quite similar to the informant in question in this case, and this informant stated that he had made several illegal whiskey purchases from a defendant. Now,

the majority of the information contained in that particular affidavit was limited to the recitation of these facts by the confidential informant, and he used the words "personal knowledge," that he had personal knowledge that a suspect was making illegal whiskey sales. The informant——

THE COURT: That is a far stretch from what you have here. The informant there said [40] he had made purchases from the man and then went on to say that he had personal knowledge.

I could agree that he had personal knowledge if he made purchases from him.

MR. OLAH: All right. The point I'm trying to get at is that the Court, in holding the affidavit sufficient in that it contained probable cause for the search, held that admissions of a crime carry their own indicia of credibility and they are sufficient at least to support a finding of probable cause for a search.

THE COURT: How do you have that here, commission of a crime?

All you have is an informant said he is carrying on a bookmaking operation.

MR. OLAH: We have an informant who has admitted at least betting with Mr. Lanese.

THE COURT: But not with Calandra?

MR. OLAH: Not with Mr. Calandra. That is correct.

THE COURT: But all we know from what you are saying is that Calandra knows Lanese.

There are probably a lot of people in the City of Cleveland that know him, make bets with him, and so forth.

[41] MR. OLAH: Right.

THE COURT: I'm assuming that he is a bookmaker, now, for the purposes of this hearing.

MR. OLAH: The Government contends that each isolated incident, if taken separately, are, as Mr. Rotatori said, seemingly innocent. I mean, they would appear to be seemingly innocent.

THE COURT: Take them together and let's see how serious they are.

You have observed them together once and you observed his car in front of his home once.

Then you observed Lanese's car in front of his business once.

And you have a bald statement from an informant that

he is a bookmaker, but this informant doesn't say anything about making bets with Lanese or Calandra or that he ever observed Calandra taking a bet or anything like that.

MR. OLAH: That is true, your Honor.

As I say, each isolated incident itself appears to be——

THE COURT: No. Even putting them together, they appear to be innocent.

MR. OLAH: We contend that in the conversations overheard during the electronic [42] surveillance and the physical surveillances and the informant's information, if the information therein is combined, the Government——

THE COURT: It all seems to be consistent with the inference that Mr. Calandra may have made some bets.

Now, let's assume all that you have there is so. So it would seem to me the inference that can be drawn from what is contained in your affidavit is that Calandra made bets with Lanese.

Even though I gave serious consideration on your first appearance in chambers when we discussed it, it seems to me really stretching what is contained in that affidavit to infer that you have sufficient information on which to issue a warrant to search for a bookmaking operation.

That is my feeling at the present time. I haven't decided this. I'm taking all of the circumstances together.

MR. OLAH: Well, again, your Honor, I wish to reiterate that the bets and wagers placed by Mr. Calandra were bet in numbers, five, seven at a time, and so forth, not a bet called in occasionally. It was list of bets that were placed.

THE COURT: It is not unusual among [43] bettors to call a bookmaker and—I don't know. When was this surveillance conducted; in the fall or baseball season or football season?

MR. OLAH: November, your Honor. During football season.

THE COURT: Football season.

Is it really unusual that one person makes seven or eight bets on football games over the weekend in football season? I think that is quite normal on the part of bettors.

MR. OLAH: I support it is not especially abnormal for one person to place a series of bets on a weekend of games on one occasion.

However, throughout the course of the interception, there were several incidents in which a series of wagers was placed.

When Mr. Calandra was told to add Detroit, this seemed to infer that this was another game on which the operation would then be accepting bets, and we feel that taken as a whole——

THE COURT: Who was told to add Detroit?

MR. OLAH: Mr. Calandra.

THE COURT: By Lanese?

MR. OLAH: By Mr. Lanese.

And we feel that taken as a whole, that was [44] sufficient evidence to at least establish probable cause for the issuance of the warrant at that location.

THE COURT: At what location are you talking about?

MR. OLAH: The Royal Machine and Tool Company, that being the issue before the Court at this time.

THE COURT: Well, I have your argument along that line with Mr. Gary's.

What about the scope?

MR. OLAH: With reference to the scope of the search, the Government is aware of the doctrine of Marron vs. United States generally.

While seizing agents are limited to only those items specifically enumerated in the warrant——

THE COURT: Now, remember, you have already admitted before this Court that you didn't go in and pick up any bookmaking paraphernalia.

MR. OLAH: That is correct.

THE COURT: Which was the purpose of your warrant.

MR. OLAH: That is correct.

THE COURT: You went in and claimed you found something else.

[45] MR. OLAH: That is correct.

Several lower Federal tribunals have made exceptions to this broad doctrine, including the Sixth Circuit in the United States vs. Eisner, when the Court stated that when an officer is proceeding lawfully, making a valid search and comes upon another crime being committed in his presence, he is entitled to seize the fruits thereof.

THE COURT: You think they did that here when they went into locked drawers and got someone to open the combination to get into another drawer?

MR. OLAH: Well, your Honor, that brings us into the contention made by Mr. Rotatori that this was, in fact, a general search, and the Government would strenuously ob-

ject to that contention on the grounds that the agents at the time were searching for wagering paraphernalia and bookmaking records.

THE COURT: So when they opened the drawer, whatever is in the drawer is in plain view; is that it?

MR. OLAH: When they opened the drawer, they found the box, the box in question. When the box was opened, the index cards were noticed [46] with names and figures on them.

Now, certainly, the searching agent at the time——

THE COURT: What kind of index cards did you get? You haven't cleared that up.

MR. OLAH: 5 by 7 index cards in a gray metal box.

THE COURT: Yes.

MR. OLAH: The index cards, I believe, contained names of various individuals and figures on them, running totals of figures, this sort of thing.

THE COURT: Those were business records of the Royal Machine and Tool Company, were they not?

MR. OLAH: Certainly some of the names on the cards were evident to the seizing agent at that time, and when he initially opened the box and leafed through the cards, there was reason to believe that these might be evidence of various gambling debts owed to Mr. Calandra and/or others at Royal Machine and Tool Company.

When the agent continued his search, he came upon evidence of the shylocking operation that was currently under investigation. He was able to discern——

[47] THE COURT: What evidence of the shylocking operation did you get?

MR. OLAH: When the agent was looking through the cards, he saw a particular name on the top of one of the cards. The agent was aware that several months prior, the United States Attorney had initiated an investigation into possible violations of 18 U.S.C. 8923 and 8924 and that the name on one of the cards was a victim of this shylocking enterprise currently under investigation by the United States Attorney. The card shows that this gentleman owed certain amounts of money and that the running tally showed that parts were paid, other items were added to the remaining balance as shown on the card.

The agent, being aware of the investigation then being conducted, was perfectly within his authority to seize the

box as evidence of another crime. It is established since the decision in Warden vs. Hayden that mere evidence may be seized, and several courts have held that seizure of items not specified in the search warrant, when evidence of another crime, may be properly seized, including the Eisner court in the Sixth Circuit.

Now, with reference to the cards being in plain [48] view, again I can only say that when the box was opened, the cards, at that time, on their face, appeared to be records of debts owed by various individuals.

An examination by the agent revealed that this might, in fact, be evidence of a shylocking enterprise, the facts of which were apparent to the agent.

The plain-view doctrine, then, would supplement the prior justification and permit the warrantless seizure in that particular instance.

The Government, then, would contend that once the agents were on the premises of Royal Machine and Tool Company searching under the authority of a valid search warrant, the discovery of evidence of crimes other than that for which they were specifically on the premises to obtain evidence for was not an intrusion into the defendant's privacy.

THE COURT: Incidentally, the questions that you intend to put to the witness in the Grand Jury room are based on your search, are they not?

MR. OLAH: They are based upon certain items that were seized during the search. That is correct.

THE COURT: Then the answer is yes?

[49] MR. OLAH: Yes.

THE COURT: All right. Thank you.

Mr. Rotatori, you asked for a moment or two.

MR. ROTATORI: Just briefly, your Honor. I don't want to belabor argument already presented in the briefs and in our supplemental brief.

But just briefly, I want to reiterate to the Court the question of probable cause must go beyond merely the question of whether there is probable cause to believe Mr. Calandra was involved in anything with Mr. Lanese.

After the Court decides that issue, it is the contention of the respondent here that the Court must then proceed to another issue, whether there was probable cause to believe

that those premises, Royal Machine and Tool, were being used in connection with the illegal gambling activity.

We cite one case which I think is particularly appropriate and the only one we have been able to find which is in any way analogous to this case, and that is from the District Court in the District of Columbia where they were involved with a numbers operation and the officer stated that he personally made bets with this numbers operator over a period of weeks, that on each occasion, he followed this [50] numbers operator to an apartment where he had conversation with an individual in this apartment, and then he followed the numbers operator to another apartment where he had conversation with the occupant of the second apartment.

Now, the District Court in that case said there was probable cause to uphold the search warrant of the numbers operator and there was probable cause to believe that the first apartment, which was registered to the numbers operator, there was probable cause to believe that that apartment contained instrumentalities and fruits of the crime, but as to the apartment which he merely visited and conversed with the individual who owned the apartment, there was no probable cause to believe that there were instrumentalities or fruits of the crime in that third apartment.

So I think that is analogous to the situations we have here. Even assuming arguendo that there is probable cause to believe Mr. Calandra was involved in an interstate bookmaking operation—and I feel that is stretching the affidavit. But assuming arguendo that that is true, does that taint carry over to his business establishment in which there is no connection whatsoever except to [51] Mr. Lanese's car was parked out front on one day?

I don't believe that gives——

THE COURT: Well, the phone conversations the Government was talking about, they escape me for the moment.

MR. ROTATORI: The phone conversations, your Honor?

THE COURT: Was that from the Royal Machine and Tool Company?

MR. ROTATORI: No. The only phone conversations delineated in that affidavit——

THE COURT: Is the one where he said to add Detroit?

MR. ROTATORI: Right. And the affidavit states that the call was made to Mr. Calandra's personal residence.

THE COURT: All right.

Well, you have made your argument on the plain view.

What do you say to the question I put to the Government? Once they get into the drawer, for example, then the cards were in plain view, or whatever they seized.

MR. ROTATORI: Your Honor, I don't believe that is what is contemplated by the [52] plain-view exception of the Supreme Court. I think the cases concerning plain view, Warden vs. Hayden and those cases following thereafter, are cases in which an officer enters a premises to execute a search warrant and there on a table, for example, is a hundred pounds of heroin, or as in the Eisner case, stolen furs are packed on a desk which he would have to close his eyes to.

But number one, when you have to go through drawers, open them up, and then, in addition to that, examine 106 cards, I think we come very, very close to the situation of Stanley vs. Georgia, where the officers found, in executing a search warrant, film and they put the film up to the light.

THE COURT: What did they actually seize? You ought to get some of that on the record.

MR. ROTATORI: Well, what was actually seized is listed in the——

THE COURT: There is an inventory attached to the affidavit.

MR. ROTATORI: There is an inventory attached to the affidavit, and in that, your Honor, we have——

THE COURT: What about the cards, for example?

[53] MR. ROTATORI: There is a list of stocks, of course, numerous stock certificates.

As far as the cards are concerned, your Honor, at this moment I don't see there enumeration of the cards on the inventory. The certificates are all listed—oh.

"Gray card holder containing cognovit notes and other notes, papers, and cards indicating names of persons and their indebtedness," is the way the inscription is listed in the inventory.

From the Government's response, they indicated that there were 106 cards, and an examination of 106 cards to come across one name is hardly plain view.

Since the cognovit notes were in the box with these cards, I think it is clear that you are not dealing with gambling

records, because I know of no gambling case in which the bookmaker accepted cognovit notes in return for a gambling debt. It is not a common practice in the bookmaking industry, so to speak. At least, no cases reflect that as a common practice.

But I think the examination, the detailed examination that took place of these cards in order to come across this one name is not consistent with [54] the plain-view doctrine in which we are dealing with something, as the Supreme Court stated in Coolidge, which is immediately apparent to the agent and being accidentally found.

THE COURT: So they have gotten one name, and the Government infers from the notations on the card that a loan had been made to that individual?

MR. ROTATORI: Yes.

THE COURT: And that he was to pay them?

MR. ROTATORI: That is the apparent argument in regard to that card, your Honor.

But even before we reach the plain-view doctrine, they have to be rightfully on the premises, of course.

THE COURT: All right. Yes.

Do you want to say something? Very briefly.

MR. OLAH: Yes.

In regards to the defense contention that the extent of the search, scope of the search in this particular instance was exploratory, I wish to point out to the Court that, again, the agents were there looking for bookmaking records, gambling paraphernalia, items which all too often are easily [55] hidden or destroyed in the interim between when the agents announce their authority and purpose and the time they reach the interior of the premises which they are attempting to search.

THE COURT: In your affidavit, did your informant say that a bookmaking operation was conducted from the Royal Machine and Tool Company or in it?

MR. OLAH: The informant stated, your Honor, on December 4, 1970 that John Calandra, as of that date, would accept bets and lay off bets on sports events and that Calandra uses his home and office on East 163rd Street for his bookmaking operation.

THE COURT: And you went to his home; right?

MR. OLAH: They did go to his home.

THE COURT: You found nothing in reference to gambling; right?

MR. OLAH: Yes.

THE COURT: You searched his automobile; correct?

MR. OLAH: Yes.

THE COURT: You found nothing?

MR. OLAH: Yes.

[56] THE COURT: Then you went to the office and you found nothing involving a gambling operation; correct?

MR. OLAH: Correct

THE COURT: Or bookmaking operation.

MR. OLAH: Again, it is important to remember——

THE COURT: And we have to keep in mind that the informant never indicated he ever made a bet with Calandra. Correct?

MR. OLAH: Correct.

THE COURT: And there is really nothing in the affidavit to show that anybody was making any bets with Calandra.

MR. OLAH: Well, we have the conversations between Calandra and Mr. Lanese which the Government contends infer that Mr. Calandra was placing series of wagers with Mr. Lanese and there is probable cause to believe that perhaps those wagers were being placed for others.

THE COURT: Well, you have conversations showing he made six or seven bets with him.

MR. OLAH: Correct.

THE COURT: During football season.

MR. OLAH: During football season. [57] Yes.

One other thing I would like to point out, your Honor, and that is——

THE COURT: Wait a minute.

And that call did not emanate from Royal Machine and Tool Company?

MR. OLAH: That is true.

THE COURT: It wasn't even made to the Royal Machine and Tool Company. It was made to his home; correct?

MR. OLAH: True.

THE COURT: I would say we have got it about as thin as we can get it.

But I will write on this and respond as quickly as possible.

I don't need any more argument.

Thank you very much, gentlemen, for your lucid argu-

ments and education of the Court in this matter.

Court is adjourned.

(Court was adjourned.)

[58] CERTIFICATE

I, Dennis A. Parise, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

/s/ Dennis A. Parise
Official Court Reporter

SUPREME COURT OF THE UNITED STATES

No. 72-734

UNITED STATES,

PETITIONER,

v.

JOHN P. CALANDRA

ORDER ALLOWING CERTIORARI. Filed February 20, 1973. The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U.S. Government Printing Office: 1973—497-944/382

No. 72-734

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-24) is not yet reported. The opinion of the district court (App. D, *infra*, pp. 27-45) is reported at 332 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 25) was entered on July 27, 1972. A petition for rehearing was denied on September 19, 1972 (App. C, *infra*, p. 26). On October 11, 1972, Mr. Justice Stewart extended the time for filing a petition for a writ of

certiorari to November 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a grand jury witness (for whom the government sought transactional immunity under 18 U.S.C. 2514) is entitled to invoke the exclusionary rule formulated under the Fourth Amendment by moving to suppress evidence intended for use in questioning him before the grand jury, on the ground that the evidence was the product of an illegal search and seizure.

STATEMENT

On December 11, 1970, federal agents obtained a warrant for the search of respondent's place of business, the Royal Machine and Tool Company (A. 4a).[1] The warrant was issued in connection with an investigation of suspected illegal gambling activities, and the object of the search was the discovery of bookmaking records and wagering paraphernalia.[2] The search was con-

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[1] "A." refers to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[2] Allegations for the search warrant had been submitted as part of a master affidavit covering several persons and places believed to have been involved in the suspected bookmaking operations of Joseph Lanese (A. 11a-36a). The information contained in the affidavit had been obtained from six informants, agents' observations, and court-approved electronic surveillance. The principal information concerning respondent was supplied by an informant who had been assisting the F.B.I. in connection with gambling cases for approximately seven years. This informant advised the F.B.I. that respondent was using his business office for a bookmaking operation. In addition, the wiretap evidence revealed several conversations between respondent and Lanese concerning gambling and the placing of bets, and the observations by agents had provided further indications of their association.

ducted on December 15, 1970 (A. 5a-6a). Although no significant gambling paraphernalia were found, papers believed to be loansharking records were discovered and seized.[3]

In March 1971, a special grand jury was convened in the Northern District of Ohio. Respondent was summoned as a witness, and he appeared before the grand jury on August 17, 1971. At that time, invoking his privilege against self-incrimination, respondent refused to answer any questions. The government then requested the district court to grant respondent transactional immunity pursuant to 18 U.S.C. 2514 (A. 37a-43a). Respondent in turn filed a "Request for Postponement of Hearing on Application for Immunity Order" (A. 44a-46a) in order that he might move to suppress the seized evidence, which the government intended to use as a basis for its questioning.

After a hearing, the district court held that respondent was entitled "to litigate the question of whether the evidence which constitutes the basis of questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure" (App. D, *infra*, at p. 37). The court then found that the search warrant had been issued without probable cause and that the scope of the search authorized was overly broad. On the basis of this finding, the court ordered the evidence to be suppressed and returned to respondent and further ordered that respondent need not answer any

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[3] The papers contained accounts of periodic loan repayments being made to respondent by a person known to be a victim of extortionate credit transactions (A. 127a).

grand jury questions based upon the suppressed evidence. The court of appeals affirmed, holding that the district judge properly entertained the suppression motion, that probable cause for the warrant was lacking, and the search exceeded the scope of the warrant, and that the exclusionary rule operated to bar questioning by the grand jury based on the seized material.

REASONS FOR GRANTING THE WRIT

The decision below improperly sanctions interference with the grand jury process by permitting a witness to interrupt and delay grand jury proceedings for the purpose of obtaining a hearing and ruling on a motion to suppress. This holding is in conflict with decisions of other courts of appeals and appears inconsistent with the views expressed by a majority of this Court in *Gelbard* v. *United States,* 408 U.S. 41. Furthermore, the court below unjustifiably enlarged the scope of the Fourth Amendment exclusionary rule by allowing the suppression of evidence upon the motion of a person who has been offered immunity from its use.

1. The decision below sanctions an unwarranted interference with the grand jury process. As this Court recently noted, the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety * * *." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (quoting from *Blair* v. *United States,* 250 U.S. 273, 282). Because "society's interest is best served by a thorough and extensive investigation" (*Wood* v. *Georgia,* 370 U.S. 375, 392), including the following up of "tips, rumors, evidence proffered by

the prosecutor, or the personal knowledge of the grand jurors" (*Branzburg* v. *Hayes, supra,* at 701), grand jury witnesses traditionally have not been permitted to challenge the evidence that led the grand jury to call them. See *Costello* v. *United States,* 350 U.S. 359; *Blair* v. *United States, supra; Holt* v. *United States,* 218 U.S. 245. Cf. *Branzburg* v. *Hayes, supra; United States* v. *Ryan,* 402 U.S. 530; *Cobbledick* v. *United States,* 309 U.S. 323; *Hale* v. *Henkel,* 201 U.S. 43.

Other courts of appeals, when confronted with the claim that evidence offered before a grand jury should have been suppressed on Fourth Amendment grounds, have recognized that collateral litigation of such claims would substantially interfere with the grand jury's function of promptly investigating criminal activities. Those courts, in conflict with the court below, have refused to apply the Fourth Amendment exclusionary rule to grand jury proceedings or to permit collateral inquiries based on the exclusionary rule. See *West* v. *United States,* 359 F. 2d 50 (C.A. 8), certiorari denied, 385 U.S. 867; *United States ex rel. Rosado* v. *Flood,* 394 F. 2d 139 (C.A. 2), certiorari denied, 393 U.S. 855; *Carter* v. *United States,* 417 F. 2d 384 (C.A. 9), certiorari denied, 399 U.S. 935.

The decision of the court below also appears inconsistent with the views expressed by a majority of this Court in *Gelbard* v. *United States, supra.* In *Gelbard,* this Court held that a grand jury witness has a statutory defense to a contempt citation for refusing to answer questions, if the questions are based upon illegal electronic surveillance. As Mr. Justice White noted in his concurring opinion, however, this result, which the

four dissenting Justices viewed as unwarranted on either statutory or constitutional grounds, "unquestionably works a change in the law with respect to the rights of grand jury witnesses, but it is a change rooted in a complex statute * * *." *Gelbard* v. *United States, supra,* 408 U.S., at 70. Respondent here raises no such statutory claim, and the challenge to the search did not raise an electronic surveillance issue. Moreover, the Court in *Gelbard* did not indicate that the statutory claim which had been asserted there as a defense against a contempt citation could have been raised collaterally during the pendency of the grand jury proceeding to test the sufficiency of a judicial warrant. The Court's opinion explicitly left that question open, even as a matter of statutory construction. See 408 U.S., at 61, n. 22. And Mr. Justice White expressly observed (*id.,* at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. * * *

The decision below treats the Fourth Amendment itself as authorizing "a full-blown suppression hearing" and thereby improperly permits "protracted interruption of grand jury proceedings."[4]

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[4] Rule 41(e), Fed. R. Crim. P., also relied on by the court below, merely "conforms to the general standard and is no broader than

2. Although we believe no grand jury witness has a right to invoke the Fourth Amendment exclusionary rule as a basis for avoiding grand jury questioning, the decision below is erroneous on an additional ground. By its ruling, the court of appeals has unjustifiably expanded the scope of the exclusionary rule by allowing the suppression of evidence upon the motion of a person who has been offered immunity from its adverse use.[5] The exclusionary rule has never been so broadly construed by this Court to provide that illegally seized evidence is "inadmissible against anyone for any purpose." *Alderman* v. *United States*, 394 U.S. 165, 175. As this Court observed in *Alderman*, where the claim was made that if any evidence used to convict any of the defendants was illegally seized, then reversal of all their convictions was required (*id.*, at 174):

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. *No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.* The victim can and very probably will object for himself *when and if* it becomes important for him to do so. [Emphasis supplied.]

Thus, as this Court stated in *Goldstein* v. *United States*, 316 U.S. 114, 120, the rule, more precisely, is

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the constitutional rule." *Alderman* v. *United States*, 394 U. S. 165, 173, n. 6. See, also, *Jones* v. *United States*, 362 U. S. 257, 261. It is clear, therefore, that Rule 41 does not constitute a statutory expansion of the applicability of the exclusionary rule this Court has formulated under the Fourth Amendment.

[5] In making this argument we do not concede the unlawfulness of the search. In our view, there was ample probable cause for the issuance of the search warrant, and the warrant issued was not unduly broad.

that "evidence obtained [illegally] cannot be used in a prosecution against the victim of the unlawful search and seizure * * *." Therefore, in order to invoke the exclusionary rule one must be the person against whom the resulting evidence is sought to be admitted. The court below failed to observe the latter limitation.[6]

Respondent, who had already invoked his privilege against self-incrimination and for whom the government has sought a grant of transactional immunity, was not seeking to prevent the use of the seized evidence against himself. He sought only to prevent its use against others who were not themselves privileged to bar its use. The court below recognized that suppression of the evidence in these circumstances constituted an extension of the basic exclusionary rule, but it reasoned that the deterrent purposes of the rule were best served by such an extension. However, this Court's holding in *Alderman*, denying a witness the right to seek suppression of evidence against others, should have special force in the context of grand jury proceedings, where "the longstanding principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable * * *." *Branzburg* v. *Hayes*, *supra*, at 688. Accordingly, the court below erred in

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[6] While Rule 41 codifies a procedure by which the victim of an allegedly unlawful search and seizure can reclaim his property, even independently of a pending criminal charge against him, suppression of the use of that evidence (enforcing the exclusionary rule) is properly confined to a criminal prosecution against the movant, and should not apply also to grand jury questioning of him. It is our view that a motion under Rule 41 is legally irrelevant to a grand jury's power to question the person filing the motion.

upholding the suppression, upon respondent's motion, of evidence which would have been used only against others.

CONCLUSION

The issues raised are important, and it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1972.

APPENDIX A

No. 71-1999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* v. JOHN P. CALANDRA, *Appellee.*	Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed July 27, 1972.

Before: PECK, MILLER and KENT, Circuit Judges.

MILLER, Circuit Judge. The United States has appealed from a decision of the United States District Court for the Northern District of Ohio in a proceeding ancillary to a grand jury investigation suppressing certain evidence seized from the place of business of a witness, the appellee Calandra, subpoenaed to testify before the grand jury, ordering the return of that evidence, and specifying that the witness need not answer any questions before the grand jury based on the suppressed evidence. While the validity of the search and seizure is presented, the principal issue is whether a district court may consider in a proceeding ancillary to a grand jury investigation a motion to suppress on Fourth Amendment grounds on behalf of a witness for whom the Government has requested immunity pursuant to 18 U.S.C. § 2514.

During the fall and winter of 1970-71 federal agents conducted a rather extensive investigation of certain alleged

bookmaking operations. Joseph Lanese was thought to be the central figure in these illegal activities. On December 15, 1970, a number of search warrants were issued based on the information set forth in a master affidavit which purported to reflect the illicit gambling operation. The information contained in the affidavit was the fruit of court-ordered wiretapping, physical surveillance of suspected participants in the alleged operation, and the statements of six informants. Among others, searches of the person, residence, and place of business of the appellee were authorized. In this case, we are concerned only with the search of Calandra's place of business, the Royal Machine and Tool Company.[1] The warrant specifically authorized the seizure of bookmaking records and gambling paraphernalia.

The business occupies a two-story building. The ground floor occupies approximately 13,000 square feet and houses industrial machinery and inventory. The offices of the company are found on the second floor. A general office area occupying approximately 1500 square feet contains the desks of four employees, drawing tables, and filing cabinets for current records. To the south and separated by a partition, is the office of Calandra, president of the company, and his secretary. The office contains desks, filing cabinets and a safe. North of the general office area is a room in

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[1] The only information in the master affidavit pertaining directly or indirectly to the premises of the Royal Machine and Tool Company was: (1) the observation that Lanese's automobile had been parked outside the building on one occasion, (2) the observation that an automobile registered in the company's names had been parked in front of Lanese's residence, and (3) the statement:

> "Informant 1 advised on December 4, 1970, that JOHN CALANDRA, as of that date, would accept bets and lay off bets, on sports event. [sic]. CALANDRA is a close associate of ANTHONY DELSANTER. CALANDRA uses his home and office on East 163rd Street for his bookmaking operation." (A. 24a).

Informant 1 was characterized in this fashion:

> ". . . [he] has personal knowledge of the bookmaking activity of Joseph Lanese in that for over an extensive period of time he has made himself or personally known of others who have made wagers with or received line information from Joseph Lanese."

which older files and business documents are stored. On December 15, 1970, these premises were subjected to an extensive and apparently careful four-hour search. The record reveals that Government agents spent more than three hours searching appellee's office, meticulously examining virtually every document found therein.

No gambling paraphernalia was discovered during this exploration.[2] However, one of the searching agents found and seized what he believed to be "loansharking" records. While examining promissory notes found in a metal box stored in a filing cabinet, this agent noticed the names of Dr. Walter Loveland on a card. The card indicated that Loveland had been making periodic payments to Calandra. The agent stated in an affidavit that his suspicions were aroused by this card because he was aware that the United States Attorney's office in Cleveland was also investigating violations of 18 U.S.C. Sections 892, 893 and 944, which proscribe certain credit transactions, and that Dr. Loveland had been a victim of the loansharking enterprise which was under investigation. Various items were then seized, including books and records of the company, stock certificates and address books. In his brief, the appellee points out that while the appellant characterizes some of these items as "loansharking" materials, the nature of the materials seized has not yet been determined.

On March 1, 1971, a special grand jury was called to investigate further violations of federal laws proscribing various "loansharking" practices in the Cleveland area. Calandra was summoned to testify on August 17, 1971. He refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The Government requested the district court to grant Calandra immunity pursuant to 18 U.S.C. § 2514 as he was not the target of the investigation. It is acknowledged by the Government that the questions which it intended to put to Calandra were based on the items seized during the December 15, 1970 search. In response, Calandra requested postponement of the hearing

[2] One football information sheet of general circulation was taken from the desk of an employee.

on the immunity question so that he might prepare his motion to suppress the evidence seized as a result of the search of the Royal Machine and Tool Company and on the ground that he had not received proper notice pertaining to the immunity proceedings. The district court granted the postponement and set the matter for oral hearing on August 27, 1971.

On August 17, 1971, Calandra moved for suppression and return of the evidence in question. The motion challenged the validity of the search on a number of grounds, asserting that the warrant was insufficient in a number of respects and that the search itself went beyond the scope of the warrant. At the August 27 hearing, Calandra stipulated that he would refuse to answer questions based on the seized materials. The district court ordered the items seized from his place of business suppressed, directed their return and specified that Calandra need not answer any questions before the grand jury based on the suppressed evidence. The court based its order on findings that due process ". . . allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure"; that the affidavit was insufficient to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia; that the evidence seized was not within the immediate "plain view" of the officers; and that the search was invalid because it was a "general search," going beyond the scope of the warrant and the permissible limits of the Fourth Amendment.

We turn first to the propriety of Judge Battisti's consideration of Calandra's Fourth Amendment claims. In the district court, the Government contended that a witness called before the grand jury lacks standing to move for pre-indictment suppression of evidence. It is the Government's view that "[t]he scope of the exclusionary rule, or, what is the same thing, standing to suppress the fruits of an illegal search and seizure, has been limited to one who

is (1) the subject of the illegal search and (2) the person against whom the evidence is sought to be admitted." While it is, in fact, clear that Fourth Amendment claims may not be raised vicariously (*Alderman* v. *United States,* 394 U.S. 165 (1969)), it is currently a matter of serious debate whether one whose Fourth Amendment right to privacy has been violated by an illegal search and seizure and is therefore a proper party aggrieved in the *Alderman* sense may assert such right when called as a witness before the grand jury. See especially *In re Egan,* 450 F.2d 199, et seq. (3rd Cir. 1971) (No. 71-263, *cert. granted,* December 14, 1971); *In re Evans,* 452 F.2d 1239 (D.C. Cir. 1971) (No. 71-256, *cert. pending*); *United States* v. *Gelbard,* 443 F.2d 837 (9th Cir. 1971) (No. 71-110, *cert. granted,* December 14, 1971); *Application of United States,* 427 F.2d 1140 (5th Cir. 1970); and *Carter* v. *United States,* 417 F.2d 384 (9th Cir. 1969) (*cert. denied* 399 U.S. 935 (1970)).

In *Weeks* v. *United States,* 232 U.S. 383 (1914), the Supreme Court first applied the exclusionary rule, although not in the grand jury context, as a means of giving effect to the Fourth Amendment guarantee of privacy. The court emphasized the duty of the federal judiciary not to sanction official disregard of the prohibition of unreasonable searches and seizures. That not only the particular items seized illegally but also the "fruit" of a Fourth Amendment violation are to be made unavailable to law enforcement officials was determined in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). The very broad language of *Silverthorne* is tempered by the fact that traditional principles of standing govern the matter of who may seek suppression of the "fruit" of an illegal search and seizure. In *Alderman* v. *United States, supra,* the Supreme Court held that ". . . suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself . . . ." This rule that Fourth Amendment rights may not be asserted vicariously is consistent with the general rule of standing relied upon by the court below which was enunciated in *Association of Data Processing Service*

Organizations, Inc. v. *Camp*, 397 U.S. 150 (1970). The Court there held that the standard for determining whether a person possesses requisite standing ". . . concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." 397 U.S. at 153.

The motion to suppress considered by Judge Battisti was filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure which provides that "[a] person aggrieved by an unlawful search and seizure" may move for the "return" and "suppression" of the evidence illegally seized. Rule 41(e) is "the statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search." *Jones* v. *United States*, 362 U.S. 257, 260 (1960). The Advisory Committee's notes report that with one exception not here relevant, Rule 41(e) "is a restatement of existing law and practice." *In re Fried*, 161 F.2d 453, 458 (2nd Cir. 1947); 3 Wright, Federal Practice and Procedure, Section 673, p. 165. The Supreme Court made plain in both *Alderman* v. *United States, supra*, and *Jones* v. *United States, supra*, that the requirement of standing to assert the exclusionary rule articulated in *Weeks, supra*, and applied to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is given expression in the "person aggrieved" language of Rule 41(e).

It has been widely held that a motion to suppress by a target defendant is proper even where no prosecution is pending. *In re Fried, supra;* and *see Centracchio* v. *Garrity*, 198 F.2d 382 (1st Cir. 1952).

It was the view of the Court in *Centracchio, supra*, that it should "respect the clear line of authority in the search and seizure cases," in light of the Advisory Committee's statement that Rule 41(e) was intended to be "merely a restatement of existing law and practice." After quoting the rule, the Court observed that "[t]his rule does not specify the time when such a motion may be made, and presumably is broad enough to sanction the filing of such

a motion in the district court prior to indictment." It is true that the Court did not grant the motion to suppress, pointing out that "[j]udicial interference of this sort . . . must . . . be regarded as the exception rather than the rule." However, the Court's ruling was not based on a rejection of its analysis of the appropriateness of a pre-indictment motion under Rule 41(e) but rather on the ground that it was "clear that the evidence in question did not come into the possession of the government officials in violation of petitioner's rights under the Fourth Amendment." It is significant to note that while generally disapproving preindictment motions to suppress, the Court pointed out one substantial reason why Rule 41(e) motions have been found appropriate exceptions to that policy. The Court stated:

> But in the unlawful search and seizure cases *there has already*, by hypothesis, *been a seizure of property or effects* from the possession of the petitioner *in violation of his constitutional right*.

The source of a district court's jurisdiction to entertain a motion to suppress prior to indictment lies in the inherent "disciplinary powers of the court." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 355 (1930). See discussion in *Smith v. Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965). Viewed in this light the argument that recourse to Rule 41(e) is limited to "parties" or "defendants" cannot be supported. A preindictment motion necessarily involves one who is not a party. It is for this reason that the preindictment suppression motion has, since before the adoption of Rule 41(e), been grounded in the supervisory power of the district court. That an individual subsequently becomes a defendant while another does not cannot be said to cause the first to have standing under Rule 41(e) and the other not. It is the status of the individual as an "aggrieved person" at the time that he files his motion to suppress that is determinative of his or her recourse to a motion to suppress, and not the intention of the United States Attorney to file an indictment against the individual.

Furthermore, contrary to the Government's assertion, the fact that Calandra would be granted immunity and hence could not be "harmed by the evidence" is irrelevant to any resolution of his standing to seek redress through a motion to suppress. The Government's position is a distortion of the nature of the rule announced in *Weeks* giving effect to the prohibitions of the Fourth Amendment. While evidence is excluded under the Fifth Amendment to prevent the abridgment of one's rights in the criminal process, the Fourth Amendment, in contrast, was not intended *to protect the rights of a defendant once involved in the process.* Rule 41(e) and the exclusionary rule generally are addressed, as the court in *Centracchio* v. *Garrity, supra,* pointed out, to the provision of redress for the constitutional violations that have already occurred.[3] The primary purpose of that redress is deterrence. As the Supreme Court stated in *Elkins* v. *United States,* 364 U.S. 206 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effective, available way—*by removing the incentive to disregard it.* 364 U.S. at 217. (Emphasis added.)

It is the right of the citizen to security from illicit intrusions upon privacy that the exclusionary principle seeks to guarantee. Additionally, the return and suppression of the fruit of an illegal search serves to give partial redress to the one whose right to privacy has been violated. Suppression may be seen as vindication of the right already infringed. That relevant evidence is suppressed is deemed a cost and not a benefit of the exclusionary rule. *Wolf* v. *Colorado,* 338 U.S. 25 (1949); *People* v. *Defore,* 242 N.Y. 13 (1926).[4]

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[3] Judge Learned Hand noted in *United States* v. *Poller,* 43 F.2d 911, 914 (2nd Cir. 1930), that "it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself . . . ."

[4] The classic statement of this aspect of the exclusionary rule is, of course, Judge Cardozo's in *People* v. *Defore, supra, that under such a rule* "[t]he criminal is to go free because the constable has blundered."

Arguably, a "person aggrieved" who is a "stranger" to criminal proceedings, ought to have enhanced standing to seek redress under Rule 41(e). Ironically enough, a corollary of the Government's position would seem to be that the "criminal" whose windfall gave concern to Judge (later Mr. Justice) Cardozo would have access to the remedy afforded by Rule 41(e) and the exclusionary rule, whereas an equally aggrieved victim of an unconstitutional invasion of privacy who was not likely to become a defendant would not. Such an anomaly is not justified in terms of the purposes of the exclusionary rule. It is well to recall the Court's statement in *Weeks, supra,* that "this protection reaches all alike, *whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws." 232 U.S. at 391-2. Thus, it is our view that the prospect of immunity in no way affected the standing of Calandra as one entitled to recourse under Rule 41(e) on the ground that he is a "person aggrieved by an unlawful search and seizure."

The question remains whether the fact that one has been called as a witness before a grand jury curtails his recourse as a "person aggrieved" to a motion to suppress pending the grand jury proceeding. In *Blair* v. *United States,* 250 U.S. 273 (1919), the Supreme Court held that a witness subpoenaed in a grand jury investigation of possible violations of the Corrupt Practices Act of 1910 had no standing to question the power of Congress to enact provisions for regulation and control of primary elections of candidates for the office of United States Senator. The Court made explicit the strict duties of one summoned before a grand jury. The court pointed out that "in the ordinary case [it is] no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." There is no question as to the vitality of the general principles enunciated in *Blair, supra.* It is true as the Second Circuit states in *United States* v. *Flood,* 394 F.2d 139 (2nd Cir. 1968), that "[i] has traditionally been held that such a witness usually cannot impede collection of evidence by

the grand jury even though the issues he seeks to raise could later be litigated—perhaps with success—by an indicted defendant . . . ." (Citing cases).

Nevertheless, as we noted at the outset, there is serious debate over the matter of whether the general rule against interference with the investigations of a grand jury applies to a motions to suppress brought by a proper "person aggrieved" by a Fourth Amendment violation. As the First Circuit pointed out in *Centracchio, supra,* the Fourth Amendment is a proper exception to the policy against preindictment motion to suppress. The *Blair* court, *supra,* made crystal clear that the general policy which it stated was subject to "exceptions and qualifications," identifying specifically the Fifth Amendment right not to incriminate oneself, pointing as well to "confidential matters . . ." and indicating that there may be other "special reasons a witness may be excused from telling all that he knows." 250 U.S. at 281.

The Supreme Court in *Blair, supra,* did not of course consider the question whether a motion to suppress the fruit of a violation of the Fourth Amendment constitutes such a "special reason." And, since *Blair,* the Supreme Court has not had occasion to consider whether "a witness may be excused from telling all that he knows" because the questions put to him are the fruit of a violation of the Fourth Amendment. However, the concept of standing to move to suppress has received considerable clarification, as we have noted, since announcement of the exclusionary rule in *Weeks* v. *United States, supra.*

It is our view that the interests identified in *Blair, supra,* and other significant factors, do not override the policy considerations which underpin the exclusionary rule and Rule 41(e). Before describing the relevant interests and attempting to set forth our view of the balance that must be struck, we should note some recent cases which seem to provide support for the Government's position that the investigative process of the grand jury should not be disturbed in order to vindicate the interests which the Fourth Amendment and the exclusionary rule seek to protect. See

in this connection, *United States* v. *Flood*, *supra*; *Carter* v. *United States*, *supra*; *Application of United States*, *supra*; and *United States* v. *Gelbard*, *supra*.

It should be pointed out that in none of these cases did the Court deal with the general standing of a "person aggrieved" to vindicate his and society's Fourth Amendment interests.

The respective interests involved are not difficult to identify. The Court in *Blair* made plain the weight which it attached to society's interest in a grand jury as an institution free to ascertain the truth through essentially unfettered inquiry, noting that the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation . . . ." 250 U.S. at 282. The Court has not departed from this view. Furthermore, it must be noted that while such inquiry may assist the prosecution, it may also be in the best interest of a potential defendant. The Supreme Court in *Costello* v. *United States*, 350 U.S. 359 (1956), further emphasized the uniqueness of grand jury proceedings by rejecting an attack on an indictment which was concededly based entirely upon hearsay evidence.

While the importance of the speedy and efficient administration of criminal justice must not be understated in this period of overloaded dockets, it is not at all clear that the procedure approved by Judge Battisti would unduly burden the functioning of the grand jury. Certainly, it was his view as a district judge that it would not. We concur in that view. This is particularly so in the instant case as the alternative to the procedure used below is the raising of the Fourth Amendment through a contempt proceeding, which would, it would seem, be more disruptive.

Against the interest of unencumbered inquiry and the efficient administration of justice must be weighed the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy which is afforded

by access to the exclusionary rule and Rule 41(e). In *Egan*, Judge Gibbons states:

> The witness' privacy yields to a paramount public interest even though his testimony may subject him to enmity, ridicule, danger or disgrace. That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator.

Such an analysis subordinates the primary interest which the motion to suppress seeks to advance. As the Court in *Elkins* v. *United States, supra,* made clear, the purpose of the suppression of the fruit of an unconstitutional infringement of privacy is to remove the incentive for such illicit activity. It is motivated by the view articulated by Mr. Justice Brandeis in his dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928):

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy.

While it is impossible to verify empirically the effectiveness of suppression in discouraging governmental invasion of privacy, it is not difficult to identify circumstances which increase the incentive to violate Fourth Amendment rights. Where such circumstances are present, the suppression device should be limited only in the face of other demonstrably substantial and overriding interests.

The Court below has properly focused upon the serious flaw of the Government's position. Increasingly, our criminal process is concerned not with the isolated individual event but with matters of considerable scope involving numerous persons, some of whom are central to the suspected or alleged crime and some of whom are not. Specifically, this tendency is a result of the increasing concern of law enforcement with "organized crime" and with con-

spiracies, whether connected with commerce or with violence. Under such circumstances, it is both logical and proper that police should concentrate their greatest effort on the key figures rather than "small fry" of suspected criminal activity. For example, it is agreed that the key to dealing adequately with the trade in heroin is not the "pusher on the street." Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise, is natural and understandable.

It is, however, precisely this temptation which the Fourth Amendment and the exclusionary rule were devised to restrain. The Fourth Amendment reflects a considered decision that, in our scheme of government, the individual's right to privacy shall not invariably give way to what is deemed most efficiency and expedient in the prosecution of crime. Suppression of the fruit of the violation of that right to privacy, for example, has been considered the most effective means of dealing with the temptation to violate it.

The importance of suppression as a device is directly proportional to the incentive that exists to violate the right. Where, as here, the incentive is greatest, access to the motion to suppress attains maximum importance.

Furthermore, it is important to emphasize that we deal with a fundamental constitutional claim that is ripe. Calandra's right to privacy has been violated.[5] As a direct result he finds himself before the grand jury to be asked questions which are the fruit of the intrusion upon his privacy. Given the immunity device, his claim is not one which will be vindicated in the criminal process. Absent the opportunity to raise the claim at this stage in the pro-

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[5] We do not find it necessary to discuss in detail the questions pertaining to the validity of the search warrant and the search itself. Upon consideration, we are of the view that the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment.

ceedings Calandra's opportunity for redress is severely limited and at the same time the very substantial incentive for law enforcement officials to combine the illegal search with a grant of immunity at the grand jury stage is unrestrained.

While we do not in any way minimize the importance of the considerations articulated in *Blair* nor the interests of orderly and efficient judicial administration, it is our view that the impact on either by the procedure applied here by Judge Battisti is not great, and that in any event these interests are outweighed by the very substantial interests of citizens to have access to the motion to suppress in circumstances such as these.

The order of the District Court is accordingly
Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-1999

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

vs.

JOHN P. CALANDRA, *Defendant-Appellee.*

Before: PECK, MILLER, and KENT, Circuit Judges.

[Filed, Jul. 27, 1972, James A. Higgins, *Clerk*]

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded inasmuch as the appeal is In Forma Pauperis.

Entered by order of the Court.

James A. Higgins
Clerk
Appellate

Issued as Mandate:

COSTS: NONE

A True Copy.

Attest:

James A. Higgins, Clerk

Filing fee .....$....
Printing .....$....
Total .....$....

APPENDIX C

No. 71-1999

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* v. JOHN P. CALANDRA, *Appellee.*	ORDER

Before: PECK, MILLER and KENT, Circuit Judges.

[Filed, Sep. 19, 1972, James A. Higgins, *Clerk*]

In this action the appellant, United States of America, has filed a petition for rehearing with the request that the case should be heard en banc.

It appearing that no judge of the Court has requested an en banc hearing, and the panel being of the opinion that the petition to rehear is without merit;

It is hereby ORDERED that the said petition and request for rehearing en banc be and the same are hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ James A. Higgins
Clerk

APPENDIX D

In re Application for Immunity of John P. CALANDRA.

No. CR 71-300.

United States District Court, N.D. Ohio, E. D.

Oct. 1, 1971.

In a proceeding ancillary to a Grand Jury hearing, a witness whom the government wished to immunize brought a motion to suppress. The District Court, Battisti, Chief Judge, held that due process requires that the witness be allowed to litigate the question of whether evidence which constitutes the basis for questions asked of him before the Grand Jury was obtained in a way which violated constitutional protection against unlawful search and seizure. The Court also held that probable cause had not been shown for the issuance of a search warrant and that the warrant was invalid as countenancing a general search.

Evidence suppressed and its return ordered; order in accordance with opinion.

1. Constitutional Law Key 257

Due process requires that witness be allowed to litigate question of whether evidence which constitutes basis for questions to be asked of him before Grand Jury pursuant to grant of immunity was obtained in way which violated constitutional protection against unlawful search and seizure. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. §§ 2514, 2515, 2518(10).

2. Gaming Key 60

Where authorized electronic surveillance produced evidence only of telephone calls made from or to witness' home, and no calls to or from his office, and conversation established only betting and furnished no evidence that witness was bookmaker, such evidence failed to establish

probable cause to search witness' business for gambling paraphernalia. U.S.C.A.Const. Amend. 4.

3. Gaming Key 60

That automobile of a purported gambler and bookmaker was seen at witness' business establishment and that automobile registered to such business establishment was seen parked in front of residence of such purported gambler and bookmaker and that both such automobiles were seen at club did not furnish probable cause for search of business establishment. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures Key 3.6(1)

Search warrant affidavit which did not specify underlying circumstances and did not describe alleged criminal activity of accused in sufficient detail that magistrate might know that informant was relying on something more substantial than casual rumor or accusation was insufficient for issuance of search warrant. U.S.C.A.Const. Amend. 4.

5. Gaming Key 60

Search warrant which countenanced general search of two-story building including first floor of about 13,000 square feet and second floor office area of about 1,500 square feet and small office occupied by person who, according to averments of informant, used his home and office for alleged bookmaking operation, was invalid. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures Key 3.7

Search warrant for either apartment house or commercial establishment is not sufficient if it merely alleges address and describes building generally; it must state with some specificity where in the building the agents expect to find particular items listed in warrant. U.S.C.A.Const. Amend. 4.

Robert Gary, Steven R. Olah, Cleveland, Ohio, Organized Crime Strike Force, for Government.

Gerald S. Gold, Robert Rotatori, Cleveland, Ohio, for Calandra.

BATTISTI, Chief Judge.

On August 17, 1971, John Calandra appeared before a Federal Grand Jury. On the same day the United States Attorney requested that John Calandra be granted immunity pursuant to Title 18, Section 2514 of the United States Code. Prior to the granting of the immunity, Calandra filed a "request for postponement of hearing on application for immunity order" in order that he might move to suppress certain evidence which he claims to have been seized in violation of the requirements of the Fourth Amendment. Calandra alleges, and the Government acknowledges, that the questions put to Calandra before the Grand Jury were based upon this evidence. The Government wishes to immunize Calandra and he has stipulated that he will refuse to answer any questions before the Grand Jury. The questions presented in this motion are whether a district court may consider a motion to suppress in a proceeding ancillary to a grand jury hearing and, if so, whether the evidence upon which the questions were based was illegally seized either because the affidavit for the search warrant did not allege probable cause for a search of the Royal Machine and Tool Company, or because the search of the Royal Machine and Tool Company was too broad in that it went beyond the allowable limits prescribed by the search warrant and the strictures of the Fourth Amendment.

I. *The Propriety of the Hearing.*

In a recent case, In the Matter of Egan, 450 F.2d 199 (3d Cir. 1971), the Third Circuit *en banc* examined a similar but not so far reaching set of facts. Sister Joques Egan, an alleged co-conspirator, but not a co-defendant in an indictment returned in the Middle District of Pennsylvania, was called before a federal grand jury and refused to testify because, among other grounds, "the information which caused the Government to subpoena her and which

prompted the questions propounded to her flowed from illegal wire tapping and electronic surveillance." 450 F.2d at 201. She was subsequently held in contempt. The Third Circuit, with which this Court concurs, held the District Court was required to hold a hearing as to the alleged violation of Sister Egan's Fourth Amendment rights because it was required by 18 U.S.C. § 2518(10), 18 U.S.C. § 2515, and the Fourth Amendment itself. In the instant case, Calandra is raising a much broader issue. He seeks to extend the narrow holding of the Third Circuit to the limit of the Fourth Amendment thus necessitating the Court's ruling upon any Fourth Amendment violation which becomes relevant within the context of the Grand Jury's examination.

The Government contends that "it is settled law that motions to suppress are not entertained in the context of a grand jury proceeding." It seems, however, that this is not settled law, that in fact it is the subject of considerable controversy. (Compare In the Matter of Egan, 450 F.2d 199 [3d Cir. 1971] and United States v. Gelbard [United States v. Parnas, 443 F.2d 837 [9th Cir. 1971]. See Greenspan and White, Standing to Object to Search and Seizure, 118 U.Pa.L.Rev. 333 (1970). It is the position of the Government that this motion is premature because it is being considered prior to the grant of immunity rather than in connection with a contempt hearing. This Court cannot agree. It has been stipulated that the Government intends to immunize Calandra and that Calandra intends not to answer its questions even at the risk of a contempt citation. Thus, in substance, the situation is in the same posture as it would be in connection with a contempt hearing. The scope of review is no larger here than it would be after Calandra had gone through the revolving door which would bring him back here raising the same issues in a defense to a contempt citation. The fact that he is not in jail is not significant, because he, like Sister Egan, would be allowed reasonable bail pending this hearing and any appeal.

The thrust of the Government's position is that Calandra

has no standing to raise search and seizure question as a witness before a grand jury. The standard for determining whether an individual possesses the requisite standing, as the Supreme Court stated, "• • • concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Normally when an illegal search and seizure has been directed against a citizen, he has standing to complain of the Fourth Amendment violation. "The fact that the question of standing arises in a grand jury investigation does not alter the result." In the Matter of Egan, 450 F.2d at 210.[1] The Government urges that since the witness will never reach the status of defendant, he is in no jeopardy and therefore he may not raise his Fourth Amendment claim. See Carter v. United States, 417 F.2d 384 (9th Cir. 1969), cert. den. 399 U.S. 935, 90 S.Ct. 2253, 26 L.Ed.2d 807 (1970). See also Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). This argument is buttressed by the language of In re Shead, 302 F.Supp. 569 at 571 (N.D.Cal.1969).

> "The constitutionally exclusionary rule of illegally-obtained evidence is based on the necessity for an effective deterrent to illegal police action. • • • The risk of not being able to achieve conviction serves this purpose. It is a truism that the deterrent is strengthened by extending the exclusionary rule to grand jury proceedings while they are in progress. *However, this would be an unduly burdensome restriction on the administration of justice.*"

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[1] There was no disagreement on the point in *Egan*. Dissenting Judge Gibbons stated "• • • [I]t is perfectly clear that a witness can create a case or controversy to test the existence of a witness privilege by standing in contempt of an order to testify. • • • Moreover it makes no difference that the witness asserts his privilege in a grand jury proceeding." 450 F.2d at 224.

Since the question of standing seems to be a "non-issue," to quote the words of dissenting Judge Gibbons in *Egan*, 450 F.2d at 224, the issue of the restriction on the administration of justice stands alone at the core of the argument of the United States. The Government relies heavily on the dissenting opinion in *Egan*. Instead of repeating the careful analysis of the Fourth Amendment question in the opinion of the Third Circuit, an examination of that dissenting opinion seems in order.

The dissenting opinion agrees with the prevalent view of the Ninth Circuit, Carter v. United States, *supra*, and the Second Circuit, United States ex rel. Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968) that the protections of the Fourth Amendment do not extend to a witness before the grand jury. Judge Gibbons objects to what he classifies as an unqualified witness privilege, which he contends the majority of the Third Circuit has created in the place of a limited exclusionary rule of evidence which operates on behalf of defendants in criminal proceedings. To prove his point, Judge Gibbons hypothesized an example. Suppose A's telephone is unlawfully tapped and further suppose that through this unlawful electronic surveillance the Government learns that A has information helpful to the defense of B, someone under indictment. If the Government discloses to B that A would be a helpful witness, A may nevertheless refuse to testify. The fact that A will not so refuse is not considered by Judge Gibbons. However, assuming that A does refuse to testify, what has the Government lost that will not be corrected next time when a lawful electronic surveillance is in operation? Consider the alternative. If a witness may not raise the Fourth Amendment claim at this time, what is to force the Government to obtain search warrants or wire tap warrants whenever it wants evidence for a grand jury investigation. Suppose A has evidence in his possession that would incriminate B. A is involved in an illegal operation with B, but B is a much more important figure in the organization supervising this illegal activity. Agents of the Government without a warrant enter A's business an dexamine every cubic foot of it. After this

thorough search in which certain evidence is found. A is then called to testify before the grand jury and is immunized. His only defense to this violation of his privacy is a term in jail for civil contempt. He may, of course, testify and incriminate B and ignore the invasion of his privacy.[2] Certainly if these are the only alternatives, as they seem to be, the sanctity of the Fourth Amendment protections will win out against the efficient administration of the grand jury. Judge Gibbons disagrees.

> "The witness' privacy yields to a paramount public interest even though his testimony may subject him to enmity, ridicule, danger or disgrace. That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator." 450 F.2d at 222.

Judge Gibbons fails to include in his equation the fact that if the Government is allowed to violate a person's privacy only when it has the requisite probable cause, he will have the needs of the grand jury satisfied without being subject to the criticism that the Fourth Amendment is suspended in the context of a grand jury investigation.

Judge Gibbons next characterizes the rights of the witness as third party rights and then states that the litigants and the judicial process, rather than the wrongdoer, are the victims of the delay that results from the adjudication of those rights. Judge Gibbons rests his position, as does the Government, in the case at bar, on the delay that will be caused by the adjudication of third-party rights. The majority opinion in *Egan* attempted to minimize the potential effect on the judicial process as a whole by saying:

> "We assume that the Government will attempt to conduct surveillance within statutory and constitutional limits, and that only in a slight number of cases will there be a

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[2] The Court notes that the defendant can sue the Government for damages or file a motion to return the seized evidence. However, both of these are inadequate. See infra pp. 741, 742.

violation of the rules governing wiretapping." 450 F.2d at 216.

There is no argument that the slight number of cases involving wire tapping is a smaller number than those involving the Fourth Amendment generally; yet, although there is no empirical evidence on either side, it seems that the possibility that some grand jury witnesses may seek hearings is not sufficient to cause a curtailment of Fourth Amendment rights. It would seem that, in the absence of empirical evidence, there would be almost a conclusive presumption in favor of the protections provided by the Constitution.

The question of delay explicit in the opinion of Judge Gibbons is one of some depth. Delay, as used in the context of judicial proceedings, does not mean merely those situations in which a trial of a proceeding ancillary to a trial takes longer than it should as compared to some ideal or textbook model. The term delay means that time during which a case is allowed to lie unresolved when there is no justifiable reason not to dispose of the lawsuit. Delay means avoidable delay. The presence of a simple personal injury case on a court's docket for three years is more likely than not an example of avoidable delay. It is not unusual for an antitrust case to be on the docket for three years or longer before discovery is completed. This is not delay. This is merely a long period of time which must elapse in order for the parties to adequately prepare themselves for the trial of this kind of a complex case. Time properly consumed in the trial of a complex case, or analyses of complex or difficult issues, or in holding a hearing to examine whether one's constitutionally protected rights have been violated is not delay, as that term is used in the context of the courts. The issue implicit in the question of delay is whether the examination of third-party rights as they arise in the context of alleged bad conduct on the part of the Government is by definition dilatory, or avoidable delay. Judge Gibbons and the Government in the case at bar seem to be insisting that it is. The Court can not agree. The judicial system is designed to protect the Bill of Rights, not to cast it aside in

a mad rush toward the goal of judicial efficiency. Any examination of a potential infringement of those rights can, under no circumstances, be considered avoidable delay. The reports cite numerous examples where courts have "delayed" the ultimate resolution of a case so that constitutional objections could be heard at a fair hearing and a reliable determination could be reached. See e. g. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1962). Therefore, the fear raised by Judge Gibbons in *Egan* and by the United States in the instant case that the adjudication of third party constitutional claims will unduly delay the grand jury proceedings in particular and the operation of the criminal process in general must be respectfully rejected.

Calandra does have other remedies. He could move to return the evidence after the conclusion of the grand jury investigation or he could sue the Government for damages. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Supreme Court held that the mere suppression of evidence is not sufficient to correct the violation of one's privacy by agents performing a warrantless search. It held that the Fourth Amendment also authorizes a suit for damages recoverable upon proof of injuries resulting from federal agents' violation of that Amendment. If suppression alone is not sufficient then how could money alone be an adequate remedy? Therefore, neither the motion to return nor a suit for damages can be held to be an adequate protection of one's Fourth Amendment rights. It is just as inadequate to be informed that one will not be prosecuted for governmental misconduct as it is to say that years later the United States may monetarily reimburse one for its violations of his privacy. Money damages do not constitute complete restitution for the infringement of constitutional rights. The remainder of the dissenting opinion deals with Section 2515 of Title 18 of the United States Code and its legislative history, which is not here relevant. The opinion near its conclusion states:

"• • • The courts started with the premise that an exclusionary rule of evidence would deter future unlawful police conduct. That premise had no empirical foundation. • • •"

Judge Gibbons rests much of his opinion on the lack of existing empirical evidence to support the decision of the majority of his court in *Egan* and constitutional decisions generally. If courts were required to rely on empiricism alone in such matters, mathematicians and philosophers rather than lawyers and judges would be involved in the trial of lawsuits. The words of Mr. Justice Day in Weeks v. United States, 232 U.S. 383, 391–393, 34 S.Ct. 341, 58 L.Ed 652 (1914) cited by the majority seems more to the point:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law."
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> • • • • •
>
> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might well be stricken from the Constitution. • • •" 450 F.2d at 217.

As Justice Brandeis stated in dissent In Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928):

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it

> invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

[1] This Court holds that there is a requirement of due process which allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure. See In re Evans. (D.C.Cir.1971).

II. *Probable Cause for the Search Warrant.*

The affidavit in support of the application for the search warrant for Royal Machine and Tool Company [3] contained information derived from three separate sources: (1) court authorized electronic surveillance, (2) physical surveillance conducted by members of the Federal Bureau of Investigation, and (3) information supplied to the Federal Bureau of Investigation by confidential informants.

[2] During the course of the lawful electronic surveillance, John Calandra was identified by name and telephone number during numerous conversations with one Joseph Lanese, a purported gambler and bookmaker. Many of these phone conversations were gambling related, but none involved the use of the phone at Royal Machine and Tool. Rather, they were made from or to Calandra's home phone. Calandra admits to these conversations, but claims that he was merely a bettor and not part of any gambling operation. The only evidence which the Government offered in support of its conclusion that Calandra was involved in a gambling operation was that on November 15, 1970, in the height of

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[3] The Government had obtained three warrants, one for Calandra's home, one for a car, and one for his business. The evidence presented in support of all three warrants was the same. We are concerned here only with the search of the Royal Machine and Tool Company.

the football season, Lanese and Calandra had a conversation during which they discussed their bets on seven games. Later that same day, during another conversation made from and to phones not in any way related to Royal Machine and Tool, Lanese told Calandra to "add Detroit," and that the point spread was eight. Even assuming that these calls were made from and to Royal Machine and Tool, it would be difficult to find probable cause based on these phone calls. See generally, Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). However, they were not. The phone calls were made to and from Calandra's home. The affiant's own conclusion about these telephone calls was that they "disclosed a betting relationship between Lanese and Calandra," but even the affiant could not conclude that Calandra was a bookmaker. The Supreme Court has recently held in Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) that 18 U.S.C. § 1952 does not make it a federal crime to cross a state line for the purpose of placing a bet. There seems to be no difference between patronizing a betting establishment by appearing in person and using the telephone. Compare *Rewis, supra,* and United States v. Chambers, 382 F.2d 910 (6th Cir. 1967). From the evidence he presented in the affidavit as it relates to the phone conversation between Lanese and Calandra, it appears that the affiant observed mere betting. However, since none of these calls in any way involved the phone at Royal Machine and Tool, this evidence has no probative value in establishing probable cause to search Calandra's business at Royal Machine and Tool for gambling paraphernalia.

[3] In addition to the conversations overheard, physical surveillance by members of the F.B.I. placed Lanese at the Royal Machine and Tool Company, and an automobile registered to Royal Machine and Tool was seen at Joseph Lanese's residence.

On November 13, 1970, Lanese's 1969 automobile was surveilled to the Royal Machine and Tool Company. This allegation alone cannot support a claim of probable cause to believe that Royal Machine and Tool was a front for a gambling operation. In the words of Spinelli v. United

States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), this visit reflects nothing more than "innocent seeming activity and data. * * * [which] could hardly be taken as bespeaking gambling activity." 393 U.S. at 414, 89 S.Ct. at 588. Spinelli's automobile was observed parked in the apartment house lot four out of five days of his surveillance. This was found by the Supreme Court to be insufficient cause for the issuance of the warrant. If four observations were insufficient, one visit must certainly be insufficient. In addition, the warrant did not allege the purpose of the visit nor did it allege that Lanese saw or spoke with anyone. Other than the fact that Lanese's car was observed in front of Royal Machine and Tool, there is no reference to any communication or connection between Lanese and Royal Machine and Tool. This is not sufficient for probable cause.

On November 16, 1970, according to the affidavit, a Pontiac registered to Royal Machine and Tool was observed parked in front of the residence of Joseph Lanese. Shortly after this "observation" Lanese telephoned the Fai-Com Club and advised the other party to the conversation that he, Lanese, and "Johnny" were coming to the club. The F.B.I. then observed both the Pontiac and Lanese's automobile in the vicinity of the Fai-Com Club. The affidavit does not allege that Calandra was operating the Pontiac. The mere fact that the Pontiac was registered to the Royal Machine and Tool Company does not mean that the company authorized its use or that the car was being used for any illegal purpose. To extend Lanese's "taint of evil" to the Pontiac and then to Royal Machine and Tool is stretching it much too far. The affidavit does not specify anything which would indicate that any illegal activity went on between the driver of the Pontiac and Lanese, and he specifies nothing that would in any way indicate that any illegal activity was being engaged in at Royal Machine and Tool. The affidavit reveals neither the identity nor the description of the driver, does not state whether he was in any way related to Royal Machine and Tool, that the driver was observed entering or leaving Lanese's residence, that the driver was observed en route to the Fai-Com Club, nor that

the driver was seen entering the Fai-Com Club. This is not sufficient to establish the existence of probable cause for the existence of a warrant to search Royal Machine and Tool.

[4] The affiant declares that on December 4, 1970, an informant advised him that as of that date Calandra would accept and lay off wagers and that defendant used his home and his office for an alleged bookmaking operation. This informant is said to be reliable, and as having made wagers and of personally knowing others who have made wagers with Lanese. *Spinelli, supra,* and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) require that an application for a search warrant set forth the underlying circumstances from which the informant drew his conclusions so as to enable the magistrate independently to judge the informant's conclusion that the accused was indeed running a bookmaking operation. No such "underlying circumstances" are here present. The affidavit in fact does not allege that the informant, the affiant or anyone known to him personally has ever placed a bet with Calandra, or observed him taking a bet, or in fact that he ever visited Calandra's home or office. An alternative is offered in *Spinelli* to the requirement of "underlying circumstances":

> "In the absence of a statement detailing the manner in which the information was gathered it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld, or an accusation based merely on an individual's general reputation." 393 U.S. at 417, 89 S.Ct. at 589.

In *Spinelli* the informant asserted that the accused used two particular telephone numbers for bookmaking. The Supreme Court found this to be insufficient. There is less presented here.

There is no attempt made in this opinion to retreat from the proposition that the standard of probable cause is a probability of criminal activity and not a prima facie show-

ing, Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), or that magistrates should be confined to "niggardly limitations or restrictions on their common sense." United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). However, the record seems to indicate that probable cause did not exist for the issuance of the warrant. See United States v. Price, 149 F.Supp. 707 (D.C. D.C.1957); United States ex rel. DeNegris v. Menser, 247 F.Supp. 826 (D.C.1965). No fact taken independently nor their sum total establish that the United States had probable cause to search Royal Machine and Tool for gambling paraphernalia.

III. *The Extent of the Search.*

Assuming, arguendo, that the search warrant was validly issued, there is a question raised as to whether the search of Royal Machine and Tool went beyond the scope of the warrant and beyond the bounds permissible under the Fourth Amendment.

The warrant in question authorized agents to seize "* * * bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices and books of records which are intended for uses in violation of Sections 371, 1084, and 1952 of Title 18, USC." The Fourth Amendment requires that the warrant shall "particularly describe the place to be searched, and the persons or things to be seized." Berger v. New York, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967). This is to make general searches impossible. Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). The items seized from Royal Machine and Tool were evidence of an alleged shylocking operation and not of a gambling operation. There are exceptions to the strict *Marron* rule, and the question before the Court is whether the evidence of the alleged shylocking operation fits into one of these exceptions.

It is well established by now that fruits of a crime, instrumentalities of a crime, contraband and mere evidence may be seized in a lawful search. See Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Evidence may be seized under one of these exceptions only when the

items seized bear a reasonable relationship to the purpose of the search.

> "There must be, of course, a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus, in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." 387 U.S. at 307, 87 S.Ct. at 1650.

As the Sixth Circuit stated in United States v. Eisner, 297 F.2d 595, 597 (6th Cir. 1962) "* * * Where an officer is proceeding lawfully, making a valid search, and comes upon another crime being committed in his presence, he is entitled to seize the fruits thereof. * * *" *Eisner* dealt with the seizure of furs stolen at another time and place, but within the plain view of the officers upon their search of Eisner's automobile. The furs in the car were not listed in the search warrant, but the Sixth Circuit held that nonetheless they could be lawfully seized. See Aron v. United States, 382 F.2d 965 (8th Cir. 1967).

The question of the parameters of the "plain view" doctrine was discussed by the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Court reaffirmed its view that the police may seize evidence in plain view without a warrant, so long as they had a valid justification for their original intrusion. The Court stated its view of the limits of such a search:

> "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." Id. 91 S.Ct. at 2038 (1971).

Stanley v. Georgia, 394 U.S. 557, 569, 89 S.Ct. 1243, 22 L.E.2d 542 (Stewart, J. concurring) provides a concrete ex-

ample of this rule. The search in *Stanley* was directed at bookmaking paraphernalia, but after a thorough search of Stanley's home the agents discovered only some allegedly obscene films which they seized. The criminal nature of this evidence was not plainly apparent. Rather, the officers had to exhibit them by means of a projector found in another room. This the concurring judges found to be an unlawful search and seizure.[4]

The items seized here in the thorough search of the offices and plant of the Royal Machine and Tool were stock certificates and other records and forms. Not until a locked file drawer in the offices of Royal Machine and Tool was opened were the items in "plain view," and only after carefully examining each and every item in this drawer could the agents determine that they may be evidence of a criminal activity. This case is too close to that of *Stanley* for this Court to depart from its teaching.

[5, 6] However, the search warrant countenanced a general search and as such is invalid. Royal Machine and Tool occupies a two-story building. The first floor housing a working area consists of approximately 13,000 square feet. The second floor contains a general office area of about 1,500 square feet and a small office occupied by Calandra and his secretary. In a four-hour search, agents searched literally the entire premise including tool boxes, lunch bags, desks of four employees, numerous filing cabinets, and a complete search of Calandra's inner office. This type of operation is closer to ransacking than a careful search for particularly described items. The affidavit does not state where within the building Calandra kept evidence of the crime of bookmaking, even as to whether it was kept in the working area or in Calandra's office. In United States v. Hinton, 219 F.2d 324 (7th Cir. 1955), the affidavit alleged sale of heroin by certain occupants in an apartment building, but the search warrant authorized a search of the entire building. The Seventh Circuit held the warrant to be void despite the Court's finding that there was probable cause

[4] The majority in *Stanley* decided the case on First Amendment grounds.

to search the apartments of four residents. Mancusi v. DeForte, 392 U.S. 364, 367, 88 S.Ct. 2120, 20 L.Ed.2d 1154 notes that the word "houses" extends to "commercial premises." See e. g. See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1932); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1919). A search warrant for either an apartment house or a commercial establishment is not sufficient if it merely alleges the address and describes the building generally. It must state with some specificity where in the building the agents expect to find the particular items listed in the warrant. See Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1964).

The United States claims that they were aware or had reason to believe that Calandra was operating a shylocking operation. They contend that when they came upon the evidence in question their belief was confirmed. They also admit that on December 11, 1970, they did not possess sufficient evidence to establish probable cause for the issuance of a warrant to search for loan-sharking records at Royal Machine and Tool (18 U.S.C. §§ 892 and 894). This simply will not do. Searches may not be justified after the fact. It seems that the Government was really searching for evidence of a shylocking operation under the guise of a search warrant for bookmaking paraphernalia. Assuming that Calandra is involved in the shylocking business, it is unlikely that evidence of his illegal activity would vanish by the time the United States had obtained sufficient evidence to establish probable cause to search Calandra's office for evidence of a shylocking operation. Then the Government could accomplish its desired result without attempting to stretch the plain view doctrine out of shape.

As the Government notes in its brief, there are no set or absolute standards or guidelines for a reasonable search; and each search must be resolved under the circumstances involved. The constitutional concept of reasonableness or unreasonableness must be imposed on the facts existing in each case. Based on the circumstances here presented, this

search is deemed to be beyond the scope of the search warrant and the warrant is held to be not based upon probable cause. The evidence seized is suppressed. Calandra need not answer any questions before the Grand Jury that are based on this evidence. The evidence seized is to be returned to Calandra forthwith.

It is so ordered.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-734

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN P. CALANDRA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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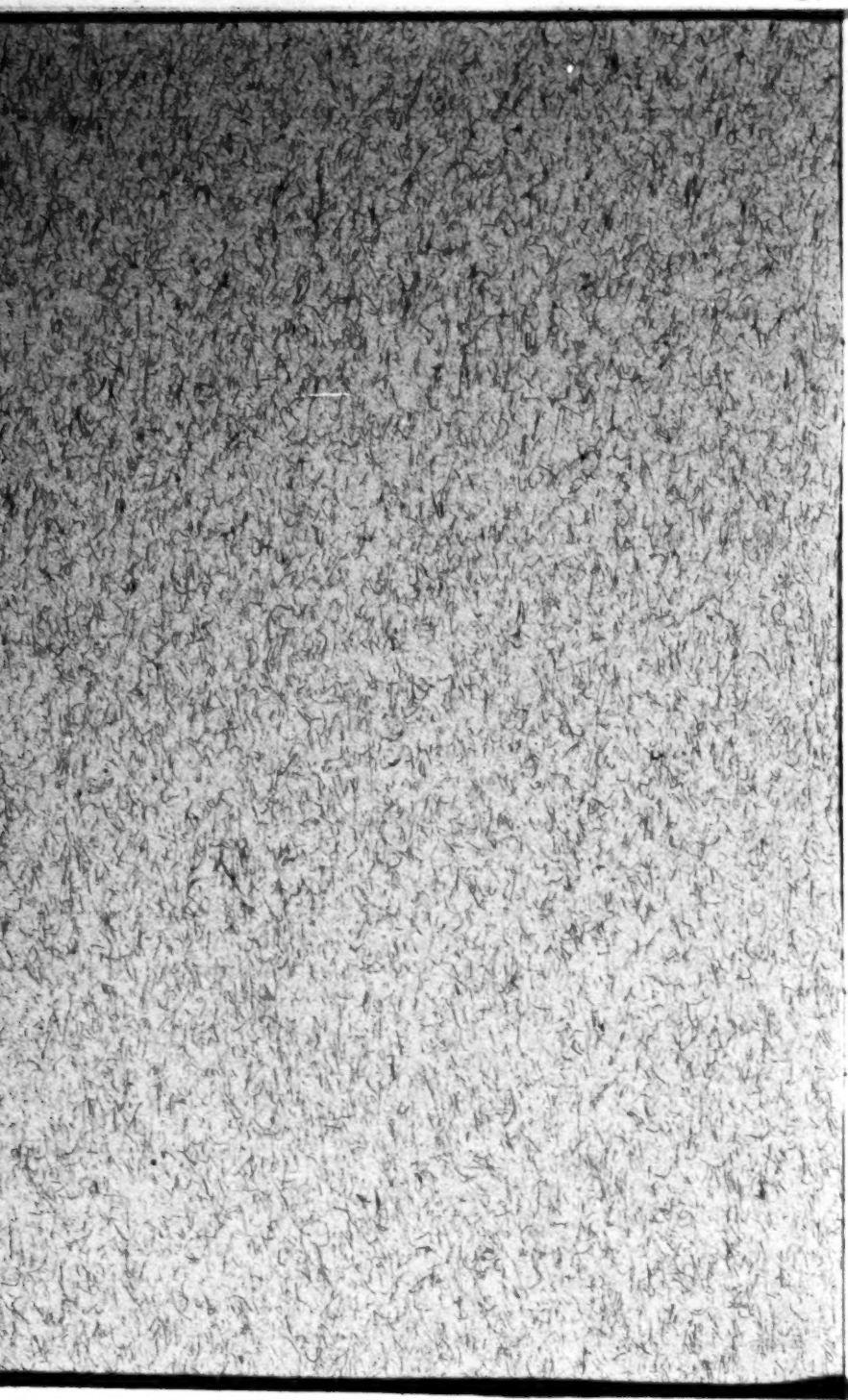

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported as *In re Application for Immunity of John P. Calandra,* 332 F. Supp. 737 (N.D. Ohio 1971) and reprinted at page 27 of the petition for a writ of certiorari. The opinion of the court of appeals is not yet reported, but is set forth at page 11 of the petition.

JURISDICTION

This Court has discretionary jurisdiction in this case pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether the district court and court of appeals erred in permitting respondent, a grand jury witness, for whom the government sought a grant of immunity, to raise his rights under the Fourth Amendment in the immunity hearing after the government had conceded that all questions to be put to respondent were based upon material seized during a search which could be determined from the face of the warrant and affidavit to be clearly illegal.

2. Whether the government may expand the invasion of privacy resulting from an illegal search and seizure by compelling the victim to submit to questioning before the grand jury about the evidence seized.

STATEMENT OF FACTS

On December 15, 1970 federal agents executed search warrants directed at respondent John P. Calandra's residence and at his place of employment, the Royal Machine and Tool Company (A. 4a-6a, 83a).[1] The warrants were issued in connection with an investigation of suspected illegal gambling activities and called for the seizure of bookmaking records and wagering paraphernalia. An extensive and meticulous four hour search of the two-story building housing the Royal Machine and Tool Company (A. 91a-92a) failed to produce any significant evidence of illegal gambling activities (A. 5a-10a).

Nevertheless a wide variety of items and documents were seized, including books and records of the company, stock certificates and address books (A. 5a-10a). Among the documents seized were papers containing accounts of

[1] "A" refers to the joint appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court by the government.

periodic loan repayments to Calandra, which the government suspected might be loansharking records since the borrower was known to have been a victim of extortionate credit transactions (A. 127a).

Its curiosity piqued by the cryptic accounts of loan repayments, the government subpoenaed Calandra to appear before a special grand jury on August 17, 1971 to interrogate him regarding questions generated by the seized evidence (A. 195a). Calandra declined to testify, invoking his Fifth Amendment privilege not to incriminate himself. Whereupon the government moved the district court for an order granting Calandra immunity, pursuant to 18 USC §2514, and compelling him to testify (A. 37a). Calandra moved to postpone the immunity hearing on the ground that he had not been given prior notice required by F.R. Civ. P. 5(a), 5(b) and 6(d) (A. 44a), desiring to use the time afforded by the Rules to develop his contemporaneously filed motion for the suppression and return of the seized evidence (A. 47a, 52a, 85a). The district court granted the postponement and set the matter for an oral hearing to be held on August 27, 1971.

The government conceded that the questions intended to be put to Calandra before the grand jury were based upon the search and seizure of December 15, 1970 (A. 195a). Calandra stipulated that he would refuse to answer any questions before the grand jury even if immunized (A. 152a-153a).[2]

On the basis of the moving papers and stipulated facts, without necessity of evidentiary hearing, the district court

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[2] The government argued in the district court (but not in the court of appeals) that Calandra's motion was premature since he could make the motion in a contempt hearing. The district court disagreed. Because it was stipulated that the government intended to immunize Calandra and that he intended not to answer questions even at peril of contempt, the contempt route would have been a revolving door, returning the parties to their previous positions without changing their postures (Petition, App. D, at p. 30).

concluded that the search warrant was issued without probable cause and that the search exceeded the scope of the warrant, and issued its order suppressing the items seized, directing their return to Calandra, and specifying that he need not answer any questions before the grand jury based on the evidence in question (Petition, App. D, at p. 45).

On the government's appeal to the United States Court of Appeals for the Sixth Circuit, a three-judge panel of that court unanimously affirmed the judgment of the district court (Petition, App. A, at pp. 11-24).[3] The government now seeks to have this Court review that judgment by the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals.

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[3] The court of appeals found it unnecessary to discuss in detail the questions pertaining to the validity of the search warrant and search, concluding in a footnote that "the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." (Petition, App. A., at p. 23).

REASONS FOR DENIAL OF THE WRIT.

The decision below is not in conflict with any decision of this Court, and is, in fact, consistent with the spirit and rationale of numerous cases decided by this Court. The allegedly conflicting decisions of other courts of appeals are factually distinguishable in significant respects.

Although the basic constitutional issue as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions [4] should ultimately be resolved by this Court, such permanent resolution should await further experience in the lower courts to provide this Court with an empirical basis for accurately weighing the competing values involved. In any event, the instant case is a poor vehicle for resolving the issue, as its peculiar facts do not facilitate a meaningful assessment of those competing values.

ARGUMENT

1. Contrary to the impression sought to be conveyed by the government, the decision below is not in conflict with any decision of this Court. Although it is claimed that "grand jury witnesses traditionally have not been permitted to challenge the evidence that led the grand jury to call them," [5] none of the cases cited in support thereof so hold. Thus, *Costello v. United States,* 350 U.S. 359 (1956) and *Holt v. United States,* 218 U.S. 245 (1910) held only that a defendant could not challenge the indictment against him on the ground that incompetent evidence was presented to the grand jury, while *Blair v. United States,* 250 U.S. 273 (1919) determined that a witness could not challenge the constitutionality of the stat-

[4] The issue was expressly left open by this Court in *Gelbard v. United States,* 408 U.S. 41, 45 n. 5 (1972).

[5] Petition, at p. 5.

ute, the violation of which was the subject of the grand jury's investigation.[6] The reaffirmation in *Alderman v. United States*, 394 U.S. 165, 171 (1969) of the "established principle . . . that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence" by no means establishes the converse, i.e., that the victim of a Fourth Amendment violation has no constitutionally recognizable interest other than preventing the introduction of damaging evidence against him. *Alderman* left room for the assertion of Fourth Amendment rights under circumstances other than threatened incriminating use of the illegally seized evidence, declaring that "[t]he victim can . . . object for himself when and if it becomes important for him to do so." *Id.*, at 174.

In fact, the decision below is consistent with principles established by numerous decisions of this Court. Thus *Silverthorne Lumber Company v. United States*, 251 U.S. 358 (1920) established the right of grand jury witnesses to assert Fourth Amendment objections to demands for evidence; *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) recognized that the Fourth Amendment protects privacy by banning unreasonable searches and seizures wholly apart from their potential for incrimination; and *United States v. Ryan*, 402 U.S. 530, 533 (1971) reviewed the cases holding that the victim of an unlawful search and seizure is not to be deprived of appellate remedies merely because no criminal charge pends against him.

The question of whether a grand jury witness may rely upon the Fourth Amendment as a basis for refusing

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[6] But the *Blair* court indicated that there may be other "special reasons a witness may be excused from telling all that he knows." *Id.*, at 281.

to answer questions was expressly left open by this Court in *Gelbard v. United States, supra,* at 45 n. 5.

2. The issue of "the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions" involves, as do most significant constitutional issues, a balancing of interests. Unless a naked choice is to be made between privacy and the efficiency of the grand jury,[7] their reconciliation requires an assessment of the weight to be accorded the competing interests under the particular circumstances involved. Thus, a rational resolution of the issue posed herein would require information as to the actual extent of interruption and delay in grand jury proceedings which would ensue as a result of recognizing the Fourth Amendment rights of witnesses, as well as knowledge of the extent of the adverse impact on privacy flowing from refusal to entertain witnesses' Fourth Amendment claims. The government asserts that there would be substantial interference with the grand jury's function. Petition, at p. 5.[8] Conversely, it has been asserted that failure to recognize Fourth Amendment rights in grand jury proceedings would "cripple enforcement of the . . . Amendment." *Gelbard v. United States, supra,* at 66 (Mr. Justice Douglas concurring).[9]

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[7] Obviously the choice is not so simple. If privacy were to be preferred under all circumstances, the Fourth Amendment would tolerate no searches, while if efficiency in law enforcement were invariably supreme, it would prescribe no limitations on their conduct.

[8] The validity of the government's claim is at least an open question in light of the apparent effectiveness of grand juries notwithstanding the extension to grand jury witnesses of the traditional common law privileges, e.g., *Blau v. United States,* 340 U.S. 332 (1951), as well as of the constitutional privilege against self-incrimination embodied in the Fifth Amendment. *Hoffman v. United States,* 341 U.S. 479 (1951).

See also the views of both courts below that the procedure employed in the district court would not "unduly burden the functioning of the grand jury." Petition, at pp. 21, 34-35.

(Footnote continued on following page)

There is little or no empirical or jurisprudential evidence available with which to evaluate these contentions.

This Court's decision in *Gelbard* and the Sixth Circuit's decision in the instant case offer this Court the opportunity to observe in subsequent lower court cases whether or not permitting grand jury witnesses to assert their rights under 18 USC §2515 and the Fourth Amendment, respectively, unduly burdens the functioning of grand juries. Conversely, the different perspective of the Ninth and Second Circuits, *Carter v. United States*, 417 F. 2d 384 (9th Cir. 1969); *United States ex rel. Rosado v. Flood*, 394 F.2d 139 (2d Cir. 1968), will permit this Court to assess the effect on privacy of a divergent resolution in those circuits.

Accordingly, respondent urges the Court to deny the petition for certiorari to enable it to assimilate the experience of the lower courts before freezing the resolution of this issue into the relative permanency of a constitutional adjudication by this Court. In the words of Mr. Justice Frankfurter:

> "A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for

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(Continued from previous page)

[9] Measuring the resulting adverse impact on privacy involves not only an assessment of the extent to which the deterrent effect of the exclusionary rule will be mitigated, but also of the extent of direct infringements of Fourth Amendment interests which will occur in the grand jury proceedings themselves, such as in the instant case where the government seeks to continue and expand the invasion of privacy commenced in its illegal search, by compelling respondent Calandra to furnish it with additional information about the evidence illegally seized.

ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

3. Even if the Court is inclined toward a relatively prompt resolution of the issue left open in *Gelbard* as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions, the instant case is a poor vehicle for doing so. As a result of its peculiar facts, this case would not facilitate an examination and weighing of the competing interests involved.

Although the government asserts that the decision below permits "protracted interruption of grand jury proceedings", Petition, at p. 6, no such delay or interruption took place as a result of Calandra's assertion of his Fourth Amendment claim. The government was required to interrupt the grand jury proceedings for an immunity hearing before the court pursuant to 18 USC §2514 (A. 37a).[10] The continuance of the hearing from August 17 to August 27 was attributable to respondent Calandra's right to advance notice under Rules 5(a) (b) and 6(d) of the Federal Rules of Civil Procedure (A. 44a-46a, 95a). The government admitted that the questions it intended to put to Calandra before the grand jury were based upon the items seized during the search in issue (A. 195a). No "full blown suppression hearing" [11] was required, as the invalidity of the search warrant was determinable from the face of the affidavit, and the facts pertaining to the scope of the search were adduced through uncontroverted affidavits (A. 91a-94a). In effect, the "hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts." [12] (A. 149a-204a).

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[10] That such an interruption might no longer be required pursuant to 18 USC §6003 suggests only that the basic issue might more properly be resolved in such a case.

[11] *Gelbard v. United States, supra*, at 70 (Mr. Justice White concurring).

[12] *Id.* at 74 (Mr. Justice Rehnquist dissenting).

These same idiosyncratic facts serve to distinguish the instant case from such cases as *Carter v. United States, supra*, and *United States ex rel. Rosado v. Flood, supra*, which arrived at contrary results. It has been noted that

> ". . . differences between the Courts of Appeals in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Harlan, J., *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 552 (1958).

CONCLUSION

For all of the foregoing reasons and authorities the Court should await the perspective of experience in the lower courts and a more appropriate case before permanently resolving the issue herein, and therefore should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 72-734

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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 465 F. 2d 1218. The opinion of the district court (Pet. App. D) is reported at 332 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1972. A timely petition for rehearing was denied on September 19, 1972. On October 11, 1972,

Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including November 18, 1972. The petition was filed on November 17, 1972, and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a grand jury witness (for whom the government has sought transactional immunity under 18 U.S.C. 2514) is entitled to refuse to answer questions put by the grand jury on the ground that the questions are based upon leads which were the product of an illegal search and seizure.

STATEMENT

On December 11, 1970, federal agents secured a warrant for the search of respondent's place of business, the Royal Machine and Tool Company, in Cleveland, Ohio (A. 5-6). The warrant was issued in connection with an investigation of suspected illegal gambling activities, and the object of the search was the discovery of bookmaking records and wagering paraphernalia. Allegations for the warrant had been submitted as part of a master affidavit covering several persons and places believed to have been involved in the suspected bookmaking operations of Joseph Lanese (A. 11-29).

The information contained in the affidavit had been obtained from five informants, from the observations of surveilling agents, and from court-approved elec-

tronic surveillance. The principal information concerning respondent was supplied by an informant who had been assisting federal agents in connection with gambling cases for approximately seven years (A. 28). This informant advised the federal agents that respondent used his business office for a bookmaking operation (A. 21).[1]

On December 15, 1970, federal agents executed the warrant directed at respondent's place of business and various papers were seized. While no significant gambling paraphernalia were found during the course of the search, an agent did discover, among certain promissory notes, a card which indicated that Dr. Walter Loveland was making periodic payments to respondent. The agent was personally aware that the United States Attorney for the Northern District of Ohio was investigating possible violations of 18 U.S.C. 892, 893 and 894, dealing with extortionate credit transactions, and that Dr. Loveland had been a victim

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[1] The informant also supplied information with respect to the gambling activities of individuals other than respondent, including Lanese (A. 17, 22-23). In each instance, the bookmaking activities alleged by the informant were corroborated by independent investigation (A. 13-18, 21-23). The informant had "personal knowledge of the bookmaking activity of Joseph Lanese in that for over an extensive period of time he [had] himself or personally known of others who [had] made wagers with or received line information from Joseph Lanese" (A. 28).

In addition to the information supplied by the informant, wiretap information and physical surveillance disclosed a betting relationship between respondent and Lanese (A. 17, 19-20).

of a loansharking enterprise being investigated (A. 50). The agent concluded that the card bearing Dr. Loveland's name was a loansharking record, and it was therefore seized.

In March 1971, a special grand jury was convened in the Northern District of Ohio in order to investigate possible loansharking activities. Respondent was subpoenaed as a witness and appeared before the grand jury on August 17, 1971. Respondent invoked his privilege against self-incrimination and refused to answer any questions. The government then requested that the district court grant respondent transactional immunity pursuant to 18 U.S.C. 2514 (A. 30-34). Respondent filed a "Request for Postponement of Hearing on Application for Immunity Order" so that he might move to suppress the evidence seized eight months earlier, which the government intended to use as a basis for questioning him (A. 35-36).

After a hearing, the district court held that respondent was entitled "to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure" (Pet. App. 37; 332 F. Supp. at 742). The court then found that the search warrant had been issued without probable cause and that, in any event, the scope of the search was overly broad. On the basis of this finding, the court granted two kinds of relief: it ordered the evidence to be suppressed and returned to respondent, and it further ordered that

respondent need not answer any grand jury questions based upon the suppressed evidence (Pet. App. 45; 332 F. Supp. at 746).

On the government's appeal, the court of appeals affirmed. The court held that the district court had properly entertained the suppression motion and that the Fourth Amendment exclusionary rule may be invoked by a grand jury witness as a bar to questioning based on an illegal search and seizure (Pet. App. 11-24; 465 F. 2d 1218). On the merits, the court summarily agreed with the district court that the search of respondent's business premises and the seizure of the loansharking record were unlawful (Pet. App. 23, n. 5; 465 F. 2d at 1226, n. 5).

SUMMARY OF ARGUMENT

A

It is well established that a grand jury is entitled to consider and act upon evidence that would be inadmissible at trial. This general rule, which applies to hearsay, tips, rumors, confessions and other evidence that might be excluded from a trial, naturally embraces probative evidence that may have been unlawfully obtained. The suppression of such probative evidence interferes with the public interest in allowing grand juries considerable latitude in pursuing the truth and helping to bring the guilty to book. Moreover, permitting reluctant grand jury witnesses to insist upon suppression hearings to challenge the legality of searches that may relate to their questioning would result in protracted interruption of grand

jury proceedings and thereby frustrate the public interest in the fair and expeditious administration of the criminal law. For these reasons a grand jury witness is not entitled to exclude probative evidence from consideration by the grand jury on the ground it was allegedly seized illegally, and he is similarly not entitled to a court order authorizing him to refuse to give oral testimony that may be based on the items seized.

B

But even assuming *arguendo* that unlawfully obtained evidence may in some situations be ordered withheld from the grand jury, respondent lacks standing to challenge the evidence here because he has been offered immunity. The exclusionary rule may be invoked only by a person who is both the subject of the search and also the one against whom the evidence is sought to be admitted. The exclusionary rule has never operated to block the use of probative evidence against third parties. In a case like this, however, where the grand jury witness seeking suppression is not himself subject to prosecution, it would be an extravagant extension of that rule to enable him to preclude the grand jury from considering the seized evidence or his responses to questions based on it against *other* persons. Such an extension of the exclusionary rule would impair the grand jury's investigative function, interrupt and delay grand jury proceedings, cause the suppression of probative evidence, and result in the release of evident criminal violators, without vindicating any proper interest of

the party aggrieved. That party's Fourth Amendment interests are sufficiently protected by allowing him to seek the return of illegally seized property and the suppression of its use in adversary proceedings *against him.*

ARGUMENT

A GRAND JURY WITNESS WHO HAS BEEN OFFERED IMMUNITY IS NOT ENTITLED TO INVOKE THE FOURTH AMENDMENT EXCLUSIONARY RULE IN A MOTION TO SUPPRESS EVIDENCE IN ORDER TO AVOID QUESTIONING BASED UPON INFORMATION PRODUCED BY AN ALLEGEDLY ILLEGAL SEARCH AND SEIZURE.

The search and seizure that respondent challenged in the context of a demand for his testimony before a special grand jury had taken place approximately eight months earlier. The search of respondent's place of business was conducted under a warrant issued by a United States Commissioner (A. 5-6) on the basis of a detailed affidavit (A. 13-29). In making the search for documents used in an illegal gambling enterprise, an F.B.I. agent discovered a record that he believed constituted the evidence and instrumentality of a federal loansharking offense against a previously identified victim.

Interrupting respondent's appearance before the grand jury, the district court entertained his motion and allowed him to forestall the grand jury investigation of the loansharking activities by litigating the validity of the earlier search warrant and the scope of the search under it. Although the government op-

posed the attempt to raise those questions as a basis for refusing to respond to grand jury questions or as a basis for delaying the issuance of an immunity order sought by the government for respondent, we also defended the merits of the search and seizure. As we pointed out in our petition for certiorari (Pet. 7, n. 5), we still maintain that the courts below erred in their decision on the merits but we do not ask this Court to review that issue. Instead, we deal only with the important threshold question whether a grand jury witness, particularly one who is being offered immunity, may permissibly raise Fourth Amendment objections to the basis of the questions put to him by the grand jury.

A. A Grand Jury May Consider, And A Grand Jury Witness Must Answer Questions Based Upon, Information Produced By An Illegal Search and Seizure.

The principle underlying the decisions below apparently is that a grand jury may not consider, and a grand jury witness need not answer questions based upon, information produced by an illegal search and seizure. However, it is well established that a grand jury is entitled to consider and act upon evidence which would be inadmissible at a trial. This general rule naturally embraces evidence which has been unlawfully obtained, and the considerations underlying the Fourth Amendment exclusionary rule do not mandate a contrary result. Accordingly, illegally seized evidence may not be ordered withheld from the grand jury, and as a corollary, a grand jury witness

may not be excused from answering questions merely because the questions are based upon such evidence.

1. This Court has often emphasized the broad investigatory powers necessarily possessed by the grand jury. As "a great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), the grand jury is empowered to operate "free from technical rules, acting in secret." *Costello* v. *United States*, 350 U.S. 359, 362. The importance of this investigatory role was strongly reaffirmed last Term in *Branzburg* v. *Hayes*, 408 U.S. 665, 700-701:

> The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. * * *
>
> * * * [T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen * * *. * * *
>
> * * * The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. * * * "When the grand jury is performing its investigatory function into a general problem area * * * society's interest is best served by a thorough and extensive investigation." * * * A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a

> crime has been committed." * * * Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. * * *

As is clear from the Court's discussion in *Branzburg*, the grand jury is not restricted to evidence which would be admissible at trial. "[T]he scope of [its] inquiries is not * * * limited narrowly by questions of propriety * * *." *Blair* v. *United States*, 250 U.S. 273, 282. "Its work is not circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries." *United States* v. *Johnson*, *supra*, 319 U.S. at 510. Thus in *Holt* v. *United States*, 218 U.S. 245, this Court refused to quash an indictment supported primarily by incompetent evidence. Similarly, in *Costello* v. *United States*, *supra*, the Court upheld an indictment based solely on hearsay testimony, stating (350 U.S. at 362) "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." An indictment valid on its face must be sustained even if the grand jury acted on the basis of information obtained in violation of the defendant's privilege against self-incrimination. *United States* v. *Blue*, 384 U.S. 251; *Lawn* v. *United States*, 355 U.S. 339. As the Court noted in *Costello* v. *United States*, *supra*, 350 U.S. at 364, to permit "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence * * * would run counter to the whole history of the grand jury

institution, in which laymen conduct their inquiries unfettered by technical rules."

2. If its historic role is to be properly fulfilled, the grand jury must be empowered to conduct full and expeditious investigations into criminal activity, unhampered by technical rules of evidence and the adversary proceedings which they entail. This consideration is the underlying rationale for allowing the grand jury to act on the basis of evidence that would not be admissible at a trial. In view of this rationale and the cases just discussed, it appears clear that a grand jury may consider and act upon evidence which has been illegally seized.[2] Such evidence, although inadmissible at trial, is trustworthy and probative, and should, like disputable confessions, hearsay, "tips,

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[2] The court below apparently read *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, as barring grand jury consideration of illegally seized evidence. However, that is not the holding of that case. In *Silverthorne* this Court reviewed a contempt order entered against a corporation and its president for refusing to honor a subpoena to produce corporate records. The order was reversed on Fourth Amendment grounds but the rationale was that the grand jury was being used improperly: it had returned a criminal indictment against the corporation and its president *before* the search and seizure—without warrant—had taken place; before the grand jury subpoena to produce the documents was served, the district court in an independent proceeding unrelated to the grand jury's request had already ruled the search and seizure illegal, and had ordered the papers returned. In that context, this Court ruled that the prior adjudication that the papers had been illegally seized and turned over to the grand jury in connection with the criminal investigation against the Silverthornes precluded subsequent efforts to require their production pursuant to subpoena.

rumors * * * or the personal knowledge of the grand jurors" (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701), be available to the grand jury.

The soundness of this conclusion is reinforced by considering the interruption and interference which would be caused by extending the exclusionary rule to grand jury investigations. The exclusionary rule would, as is evidenced by the decisions below, not only withdraw probative evidence from the grand jury's consideration but also cause the protracted delay characteristic of adversary proceedings. Suppression hearings, which would be required for effective enforcement of the exclusionary rule, are time-consuming; they frequently involve the determination of difficult questions of fact and law and thereby require the presentation of evidence, oral argument, and in many instances the preparation and filing of briefs as well. The consequent delay that would be imposed upon the grand jury would intolerably interfere with "the proper performance of its constitutional mission." *United States* v. *Dionisio*, No. 71-229, decided January 22, 1973, slip op. at 16. It was in part for that reason that this Court in *Dionisio*, and the companion case, *United States* v. *Mara*, No. 71-850, decided January 22, 1973, held that a grand jury witness must provide voice or handwriting exemplars without an adversary hearing on the grand jury's need for the information or on the "reasonableness" of the demand under the Fourth Amendment. The Court emphasized in *Dionisio* (slip op. at 16) that, if the grand jury is "even to approach the proper per-

formance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."

Respondent seeks precisely this litigious interference with grand jury proceedings, in order to try collateral issues and suppress material evidence, even though none of his "legitimate rights" is at stake in the grand jury proceedings and he has other remedies to protect his legitimate interests. See, pp. 19, 23, n. 9, *infra*. He demands, and the courts below granted, "a full-blown suppression hearing * * * [causing a] protracted interruption of grand jury proceedings." *Gelbard* v. *United States*, 408 U.S. 41, 70 (concurring opinion of Mr. Justice White). But there is no warrant in the opinions of this Court for the satisfaction of such a demand. To the contrary, the Court has repeatedly discouraged litigious interference with the grand jury. See *United States* v. *Ryan*, 402 U.S. 530; *Cobbledick* v. *United States*, 309 U.S. 323. The importance of unimpeded grand jury investigations was strongly reaffirmed only a few months ago in *United States* v. *Dionisio*, *supra*, slip op. at 15-16:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

Extending the scope of the exclusionary rule to grand jury proceedings would have the result condemned by

this Court in *Dionisio*—the impeding of the grand jury's investigation, both through delay and the withholding of probative evidence, with the consequent disruption of law enforcement. In order to protect "the public's interest in the fair and expeditious administration of the criminal laws," grand juries must be allowed to consider and act upon unlawfully obtained evidence, and therefore such evidence cannot be withheld from a grand jury upon a motion to suppress.

The Court's decision in *Gelbard* v. *United States*, 408 U.S. 41, strongly suggests that this general principle remains valid. In that case the Court explicitly noted (408 U.S. at 45, n. 5) that it was not establishing a "right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions" before a grand jury. Rather, in that case the right to litigate the basis upon which questions were being posed was rested solely on the unique provisions of the federal wiretapping statute, 18 U.S.C. 2515. Those provisions are, of course, inapplicable here, where the validity of a physical search of the premises, not of a wiretap, is being raised. In his separate concurring opinion, Justice White stated that the result reached by the Court was "rooted in a complex statute" and that the decision, to that limited extent, "unquestionably works a change in the law with respect to the rights of grand jury witnesses" (408 U.S. at 70), a change which he suggested might not even have a statutory basis if the wire interception had taken place pursu-

ant to a warrant.[3] Therefore, a majority of the Justices in *Gelbard* evidently recognized that where there is no special statutory basis for challenging the evidentiary predicate on which grand jury testimony is sought, a hearing on such a challenge is "not only unauthorized by law, but completely contrary to the ingrained principles which have long governed the functioning of the grand jury." 408 U.S. at 78 (dissenting opinion of Mr. Justice Rehnquist, joined by Burger, C.J., and Blackmun and Powell, JJ.).

In short, as a majority of this Court evidently agreed, the exclusionary rule has not been, and should not be, extended to grand jury proceedings. See also *Truchinski* v. *United States*, 393 F. 2d 627 (C.A. 8), certiorari denied, 393 U.S. 831.[4]

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[3] In the present case, of course, the seizure took place during the execution of a federal search warrant.

[4] Nothing in Rule 41(e) of the Federal Rules of Criminal Procedure, relied on by the courts below, supports respondent's claim to avoid testifying before the grand jury. Rule 41(e) merely "conforms to the general standard and is no broader than the constitutional rule." *Alderman* v. *United States*, 394 U.S. 165, 173, n. 6. See, also, *Jones* v. *United States*, 362 U.S. 257, 261. Thus Rule 41(e) (both at the time of the hearing and in its present form) simply provides that a successful motion for return of illegally seized property and for suppression makes the property inadmissible "in evidence at any hearing or trial." By its terms, therefore, Rule 41(e) does not purport to authorize exclusion of probative evidence from grand jury proceedings, which are neither hearings nor trials. Compare 18 U.S.C. 2515, before the Court in *Gelbard*, which made the fruits of illegal wiretapping inadmissible "in any trial, hearing, *or other proceeding* in or before any court, *grand jury*, department * * * [etc.]" (emphasis added).

The present case, indeed, involves more than simply the exclusion of evidence that had allegedly been seized illegally, for respondent has also been granted the privilege not to answer questions that are "based" on the evidence suppressed. But it follows *a fortiori* from what we have discussed that no grand jury witness is entitled to seek a judicial order protecting him against questioning based on unlawfully obtained evidence. Such an order, like a suppression order, would require an elaborate judicial inquiry into the circumstances surrounding the search and an analysis of the relevant legal principles, and would therefore interfere with the conduct of the grand jury investigation in the same manner, and to the same extent, as a "full-blown suppression hearing." Moreover, "the long-standing principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688. *United States* v. *Dionisio*, *supra*, slip op. at 8.

Thus, while his Fifth Amendment privilege against self-incrimination may be invoked by a grand jury witness where applicable, there is no justification for establishing a new privilege under the Fourth Amendment that would allow him to conceal probative and relevant testimony from the grand jury simply because the questions put to him may be based on improperly seized evidence.[5] The Fifth Amendment

[5] Grand jury witnesses traditionally have not been permitted a full adjudication of broad claims of testimonial privilege or immunity prior to appearing before the grand jury; even when available in grand jury proceedings, such claims are

privilege, coupled with the Fourth Amendment remedies traditionally available under Rule 41(e)—return of the seized property and exclusion of the property and its fruits from an *adversary* hearing or trial—are broad enough to protect the grand jury witness's legitimate interests. The courts below therefore erred in holding that respondent need not answer any questions based upon the allegedly illegally seized evidence.[6]

3. Furthermore, the holding of the court below does not significantly advance the purposes of the Fourth Amendment exclusionary rule. A grand jury witness has other remedies that are adequate to vindicate his personal Fourth Amendment interests, without creation of a new application of the exclusionary rule to grand jury proceedings. But the deterrent objective of the exclusionary rule likewise would not support the expansion decreed below. The extent to which the exclusionary rule accomplishes its deterrent objective at all is not known and perhaps cannot be known (see *Elkins* v. *United States*, 364 U.S. 206, 218), and the efficacy of the rule has been broadly

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properly litigated as defenses to charges of contempt for a refusal to testify to particular questions. Cf. *United States* v. *Ryan*, *supra*; *Cobbledick* v. *United States*, *supra*; *Silverthorne Lumber Co.* v. *United States*, *supra*; *Alexander* v. *United States*, 201 U.S. 117.

[6] Since we believe that the exclusionary rule does not extend to grand jury proceedings at all, we would further contend that the illegal seizure, standing alone, would not constitute a defense to a charge of contempt for a completed refusal to testify. However, that issue is not raised in this case.

disputed. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 424-427 (appendix to dissenting opinion of Chief Justice Burger). In light of this widespread uncertainty over the utility of the exclusionary rule, its application should be extended, if at all, only with great caution, in circumstances where the need to safeguard fundamental privacy values outweighs the strong public interest in the disclosure and use of evidence.

The public interest in the prompt and full disclosure of evidence to the grand jury is beyond dispute. See, *e.g.*, *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 699-701; *Costello* v. *United States*, *supra*, 350 U.S. at 362. By contrast, extension of the exclusionary rule to grand juries would do little to promote the privacy interests protected by the Fourth Amendment. For any rule to have a deterrent effect, it must remove an incentive (or impose a punishment), but there is already little or no incentive for the discovery of evidence which cannot be used at trial; thus a holding that illegally seized evidence cannot even be presented to the grand jury has a very limited disincentive or deterrent effect. Such an extension of the exclusionary rule would deter only police investigative action consciously directed toward the discovery of evidence solely for purposes of grand jury consideration; the instances of such intentional police action must be comparatively rare.

Furthermore, this Court has consistently rejected arguments seeking expansion of the exclusionary

rule in order to "intensify" its deterrent objectives. Balancing all of the relevant interests, the Court has concluded that illegally seized evidence can even be used at trials to convict co-defendants if they were not themselves the subjects of the underlying Fourth Amendment intrusion. See, *e.g.*, *Brown* v. *United States*, No. 71-6193, decided April 17, 1973; slip op. 4-7; *Alderman* v. *United States*, 394 U.S. 165, 174; *Wong Sun* v. *United States*, 371 U.S. 471, 492. The essence of such decisions is that more limited remedies are available to vindicate the Fourth Amendment interests at stake and provide an adequate measure of deterrence. In the present context, those remedies would include return of the seized property, exclusion of the property and its fruits from evidence against respondent at a criminal trial, and an action for damages.

Finally, it should not be overlooked that the search in this case was conducted pursuant to a warrant. While it is questionable whether the exclusionary rule serves any deterrent function when investigators are proceeding in good faith pursuant to a judicial warrant, there is certainly no cause to allow a grand jury witness to interrupt grand jury proceedings in a collateral attempt to impeach the validity of a search warrant. See *Gelbard* v. *United States*, *supra*, 408 U.S. at 70 (concurring opinion of Mr. Justice White). That is what respondent has been permitted to do in this case.

For all these reasons this Court should hold that a grand jury witness cannot refuse to testify before

the grand jury by claiming that the questions to be posed are based upon items that may have been seized in violation of the Fourth Amendment.

B. The Fourth Amendment Exclusionary Rule May Not Be Invoked By A Witness To Prevent Questioning With Respect To Which He Has Been Offered Immunity.

1. As we have sought to show, no grand jury witness—including the party who may be the target of the investigation—should be permitted to prevent the grand jury from considering evidence seized from him or from securing testimony from him based on the materials seized. But even if a suspected criminal who is himself the subject of a grand jury investigation were to be allowed to require the withholding of allegedly illegally seized evidence from the grand jury, and to refuse to answer grand jury questions based on that evidence, respondent is entitled to no such relief. In this case, respondent has been offered immunity and is obviously seeking only to block the use of evidence against others and not against himself. Extending the exclusionary rule to his claim in this setting would be extravagant.[7]

The exclusionary rule does not "provide that illegally seized evidence is inadmissible against any-

[7] Although this case involves the attempt to confer transactional immunity under 18 U.S.C. 2514, identical considerations would also apply where the witness is offered immunity from the use against him of his compelled testimony and its fruits under 18 U.S.C. 6001-6003. See *Kastigar* v. *United States*, 406 U.S. 441.

one for any purpose." *Alderman* v. *United States, supra,* 394 U.S. at 175. Historically the rule has more narrowly provided only that "evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection." *Goldstein* v. *United States,* 316 U.S. 114, 120. Thus the scope of the exclusionary rule, or the standing to suppress the fruits of an illegal search and seizure, has been restricted to one who not only was the subject of the search but also is the person against whom the evidence obtained is sought to be admitted. In short, the exclusionary rule acts only to prevent the conviction at trial of an accused on the basis of evidence seized from him in violation of the Fourth Amendment.

The courts below ignored this fundamental limitation on the scope of the exclusionary rule. In doing so, the court of appeals reasoned (Pet. App. 23-24; 465 F. 2d at 1226-1227) that suppression of the evidence was necessary in order to vindicate respondent's Fourth Amendment rights. But since the evidence, and respondent's testimony with respect to it, was sought only for use against others, no rights of respondent were any longer at issue. As this Court stated in *Alderman* v. *United States, supra,* 394 U.S. at 174:

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.

The Court re-echoed this theme quite recently in reaching a similar result in *Brown* v. *United States*, *supra*.

Furthermore, foreclosure of the use of evidence against third parties is not, in any event, a suitable remedy for infringements upon Fourth Amendment rights. Suppression of evidence in such circumstances merely gratuitously benefits persons who themselves lack standing to complain about the legality of the search; it does not vindicate any cognizable interest of the victim of the search. Respondent essentially is in the same position as a witness who, having refused to testify solely on Fifth Amendment grounds, is offered immunity. Although such a witness may prefer not to testify, he has no constitutionally protected interest in preventing the use of his own self-incriminating but immunized testimony against others. See, generally, *Kastigar* v. *United States*, 406 U.S. 441.[8] There appears to be no reason why a reluctant witness in a grand jury proceeding should be allowed to invoke the Fourth Amendment as a shield for third parties when he could not assert a Fifth Amendment privilege to help them either before the grand jury or at a trial and when it has

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[8] This Court again recently acknowledged, in *United States* v. *Dionisio*, *supra*, slip op. at 8, that a witness may not avoid his responsibility to appear and give evidence even if that duty is burdensome:

> "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." * * * And while the duty may be "onerous" at times, it is "necessary to the administration of justice."

long been settled that third parties are not derivatively entitled to the benefit of his Fourth Amendment rights at trial.[9]

2. The reasoning of the court of appeals is not limited to grand jury witnesses. The court's rationale would presumably even authorize a non-witness to challenge the presentation of evidence to the grand jury or at trial, on the ground that the discovery of the evidence infringed his Fourth Amendment rights; non-party witnesses at criminal trials could assert a similar claim. There is no basis for this anomalous result: the third-party suspect or defendant, whom the evidence may help indict or convict, cannot suppress it (*Alderman* v. *United States, supra; Goldstein* v. *United States, supra*) and the person whose Fourth Amendment rights were invaded is not further harmed by the use of the evi-

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[9] The court of appeals (Pet. App. 23; 465 F. 2d at 1227) deemed it necessary for respondent's Fourth Amendment claim to be "vindicated in the criminal process." We see no reason why vindication of a mere witness's Fourth Amendment rights must intrude into the criminal process. Respondent may be entitled to assert a cause of action for damages. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.* Moreover, outside of the context of the grand jury proceedings, respondent might properly move for the return of the seized property pursuant to Rule 41(e), Fed. R. Crim. P. See *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344. But Rule 41(e), as we have seen (note 4, *supra*), "is no broader than the constitutional rule" (*Alderman* v. *United States, supra,* 394 U.S. at 173, n. 6): it properly contemplates only foreclosure of the use of the evidence against the movant and not suppression of the evidence generally with respect to all parties.

dence against others. Suppression of evidence in such circumstances would simply frustrate legitimate efforts to hold the guilty responsible for their actions without any compensating societal advantage. In addition, permitting non-witnesses or non-defendants to interpose objections to the introduction of evidence before a grand jury or at trial would result in extensive interruption and delay at both the grand jury and trial levels. The individual's remedies under the Fourth Amendment have, for sound reasons, never reached so far.

Thus the extension of the exclusionary rule sanctioned by the courts below would substantially complicate the criminal-justice process, subvert its search for truth, and result in the release of evident criminal violators, without either enhancing the deterrent effect of the rule or vindicating any proper interest of the party aggrieved. At least where he is offered immunity from prosecution or from the use against him of the testimony he may give, a grand jury witness should not be allowed to litigate the validity of the seizure of evidence that may form the basis for questioning him, as a way of escaping his duty to cooperate in the grand jury's inquiry.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1972

No. 72-734

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN P. CALANDRA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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Constitution, Statutes and Rules

In the Supreme Court of the United States

October Term, 1972

No. 72-734

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN P. CALANDRA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the government may expand the invasion of privacy resulting from an illegal search and seizure by compelling the victim to submit to questioning before the grand jury about the evidence seized.

STATEMENT OF FACTS

On December 15, 1970 federal agents executed search warrants directed at respondent John P. Calandra's residence and at his place of employment, the Royal Machine

and Tool Company (A. 5-6, 83a).[1] The warrants were issued in connection with an investigation of suspected illegal gambling activities and called for the seizure of bookmaking records and wagering paraphernalia. An extensive and meticulous four hour search of the two-story building housing the Royal Machine and Tool Company (A. 46-47) failed to produce any significant evidence of illegal gambling activities (A. 7-10).

Nevertheless a wide variety of items and documents were seized, including books and records of the company, stock certificates and address books (A. 7-10). Among the documents seized were papers containing accounts of periodic loan repayments to Calandra, which the government suspected might be loansharking records since the borrower was known to have been a victim of extortionate credit transactions (A. 50).

Its curiosity piqued by the cryptic accounts of loan repayments, the government subpoenaed Calandra to appear before a special grand jury on August 17, 1971 to interrogate him regarding questions generated by the seized evidence (A. 75). Calandra declined to testify, invoking his Fifth Amendment privilege not to incriminate himself. Whereupon the government moved the district court for an order granting Calandra immunity, pursuant to 18 USC §2514, and compelling him to testify (A. 30-31). Calandra moved to postpone the immunity hearing on the ground that he had not been given prior notice required by F.R.Civ.P. 5(a), 5(b) and 6(d) (A. 35-36), desiring to use the time afforded by the Rules to develop his contemporaneously filed motion for suppression and return of the seized evidence (A. 37, 52a, 41). The district court granted the postponement and set the

[1] Appendix references followed by "a" refer to items contained in the joint appendix filed in the court of appeals but not included in the printed appendix filed in this Court.

matter for an oral hearing to be held on August 27, 1971.

The government conceded that the questions intended to be put to Calandra before the grand jury were based upon the search and seizure of December 15, 1970 (A. 75). Calandra stipulated that he would refuse to answer any questions before the grand jury even if immunized (A. 53).[2]

On the basis of the moving papers and stipulated facts, without necessity of evidentiary hearing, the district court concluded that the search warrant was issued without probable cause and that the search exceeded the scope of the warrant, and issued its order suppressing the items seized, directing their return to Calandra, and specifying that he need not answer any questions before the grand jury based on the evidence in question (Petition, App. D, p. 45).

On the government's appeal to the United States Court of Appeals for the Sixth Circuit, a three-judge panel of that court unanimously affirmed the judgment of the district court (Petition, App. A, pp. 11-24).[3] On February

[2] The government argued in the district court (but not in the court of appeals) that Calandra's motion was premature since he could make the motion in a contempt hearing. The district court disagreed. Because it was stipulated that the government intended to immunize Calandra and that he intended not to answer questions even at peril of contempt, the contempt route would have been a revolving door, returning the parties to their previous positions without changing their postures (Petition, App. D, p. 30).

[3] The court of appeals found it unnecessary to discuss in detail the questions pertaining to the validity of the search warrant and search, concluding in a footnote that "the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." (Petition, App. A, p. 23). The government does not contest this aspect of the ruling in this Court (Brief for the United States, p. 8).

20, 1973 this Court granted the government's Petition for a Writ of Certiorari to review that judgment.

SUMMARY OF ARGUMENT

A

Although criminal defendants may not challenge their indictments on the basis of the evidence presented to the grand jury and grand jury witnesses are not entitled to raise objections based on those evidentiary rules designed to assure relevance or probity, it has long been recognized that witnesses may withhold testimony from a grand jury on the basis of constitutional, statutory or even common law privileges guarding against revelation or protecting relationships. This Court has specifically upheld the right of grand jury witnesses to withhold evidence on Fourth Amendment grounds. *Silverthorne Lumber Co. vs. United States,* 251 U.S. 385 (1920); *Hale vs. Henkel,* 201 U.S. 43 (1906).

Here the government sought to expand its invasion of respondent Calandra's privacy resulting from the illegal search and seizure, by compelling him to submit to questioning before the grand jury about the evidence seized. The district court and a unanimous court of appeals upheld his right to resist. The government, seeking to appeal to this Court's growing disenchantment with the exclusionary rule, characterizes the judgment of the courts below as simply an extension of that rule, having minimal deterrent effect at great cost to grand jury efficiency and the administration of justice. However, the interest at stake on the side of respondent Calandra's right to resist is not merely, or even primarily, the enhancement of the deterrent effect of the exclusionary rule, but rather the prevention of a further invasion of that privacy which the

Fourth Amendment was designed to protect. Unlike the usual suppression situation, the invasion of privacy has not yet been completed and can still be partially prevented. Thus, it is not this Court's devotion to the exclusionary rule *remedy* that is tested by this case, but rather its fidelity to the Fourth Amendment *right* of privacy itself that is in issue.

The government's dire forecast of intolerable interference with grand jury proceedings is unsupported by either empirical or jurisprudential evidence of such disastrous consequences in prior related experience, nor by the particular facts of this case. What minimal delay may be involved in recognizing the right of grand jury witnesses to assert, under appropriate limitations, their Fourth Amendment rights cannot justify the substantial harm to privacy, "the right most valued by civilized men." *Olmstead vs. United States,* 277 U.S. 438, 478 (1928) (Mr. Justice Brandeis dissenting).

B

Respondent Calandra resists the effort to compel his testimony, not for the purpose of preventing the introduction of evidence already disclosed (against himself or others), but rather to prevent the government from further invading his privacy by compelling disclosure of additional matters, as a direct result of its unlawful search and seizure. The government's contention that Calandra's privacy interest is vindicated by a grant of immunity from prosecution confuses the Fourth Amendment right (privacy) with the remedy (the exclusionary rule). Although a grant of immunity vindicates the constitutional interest protected by the Fifth Amendment privilege against self-incrimination, it does nothing to vindicate the right of privacy protected by the Fourth Amendment. According-

ly this Court has upheld the standing of grand jury witnesses to assert privacy claims notwithstanding grants of immunity from prosecution. *United States vs. Egan*, 408 U.S. 41, 45 (1972); *Hale vs. Henkel*, 201 U.S. 43 (1906).

ARGUMENT

A. A GRAND JURY WITNESS IS ENTITLED TO RAISE FOURTH AMENDMENT OBJECTIONS TO QUESTIONS CONCEDEDLY DERIVED FROM A SEARCH AND SEIZURE WHICH COULD BE DETERMINED FROM THE FACE OF THE WARRANT AND AFFIDAVIT TO BE CLEARLY ILLEGAL.

1. It is not true, as the government would have the Court believe, that grand jury proceedings have been, or must be, wholly impervious to all evidentiary rules and limitations.[4] Although criminal defendants may not challenge their indictments on the basis of the evidence presented to the grand jury and grand jury witnesses are not entitled to raise objections based on those evidentiary rules designed to assure relevance or probity, it has long been recognized that witnesses may withhold testimony from a grand jury on the basis of constitutional, statutory, or

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[4] Most of the cases cited by the Government for this proposition are wholly inapposite to the adjudication of the rights of a grand jury witness, as *United States vs. Blue*, 384 U.S. 251 (1966); *Lawn vs. United States*, 355 U.S. 339 (1958); *Costello vs. United States*, 350 U.S. 359 (1956); *United States vs. Johnson*, 319 U.S. 503 (1943); and *Holt vs. United States*, 218 U.S. 245 (1910) all involved efforts by criminal defendants to challenge their indictments, and none considered the rights of grand jury witnesses; while *Blair vs. United States*, 250 U.S. 273 (1919) (which did reject the claim of a witness to challenge the grand jury's jurisdiction) recognized that the duty to give evidence to the grand jury

". . . is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . .; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows." *Id.*, at 281-82.

even common law privileges guarding against revelation or protecting relationships.[5]

Specifically this Court has, on at least two occasions, upheld the right of grand jury witnesses to withhold evidence on Fourth Amendment grounds. *Silverthorne Lumber Co. vs. United States,* 251 U.S. 385 (1920); *Hale vs. Henkel,* 201 U.S. 43 (1906).

The government understandably seeks to fudge the distinction between the interest of an indicted defendant in attacking his indictment on grounds of the incompetency of evidence presented to the grand jury, and the right of a witness to resist compulsion of his testimony before the grand jury. However, it is, both conceptually and functionally, a crucial distinction, recognized by this Court in *Gelbard vs. United States,* 408 U.S. 41, 60 (1972). A defendant's interest in not being branded a criminal by unreliable or prejudicially irrelevant evidence can be vindicated in his subsequent trial, while the breach of a witness' privacy or protected confidential relationship can never be repaired.

The government, seeking to appeal to this Court's growing disenchantment with the exclusionary rule,[6]

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[5] See, e.g., *Hoffman vs. United States,* 341 U.S. 479 (1951) (Fifth Amendment privilege against self-incrimination); *Gravel vs. United States,* 408 U.S. 606 (1972) (Article I speech or debate clause); *Blau vs. United States,* 340 U.S. 332 (1951) (husband-wife privilege); *Alexander vs. United States,* 138 U.S. 353 (1890) (lawyer-client privilege); *Continental Oil Co. vs. United States,* 330 F.2d. 347 (9th Cir. 1964) (attorney-client privilege); *In Re Verplank,* 329 F.Supp. 433 (C.D. Cal. 1971) (clergyman-communicant privilege); *Application of Grand Jury,* 286 App. Div. 270, 143 N.Y.S.2d 501 (1955) (physician-patient privilege).

[6] See *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 411-427 (1971) (Chief Justice Burger dissenting); *Coolidge vs. New Hampshire,* 403 U.S. 443, 490 (1971) (Mr. Justice Harlan concurring) *Schneckloth vs. Bustamonte,* U.S. , 41 U.S.L.W. 4726, 4741 (May 29, 1973) (Mr. Justice Powell concurring).

characterizes the judgment of the courts below as an unprecedent extension of that rule into the sacred province of the grand jury. However, in the only case ever decided by this Court on the question of whether the victim of an illegal search and seizure could resist producing before the grand jury evidence discovered during the course of an unlawful search, *Silverthorne Lumber Co. vs. United States, supra*, the Court upheld the claim of the witness.[7] Mr. Justice Holmes' opinion for the Court eloquently rebuts the government's contentions in the instant case:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act.
>
> * * *
>
> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be

[7] In light of *Silverthorne*, it is difficult to understand Mr. Justice White's observation in *Gelbard vs. United States*, 408 U.S. 41 (1972) that 18 USC §2515 "unquestionably works a change in the law with respect to the rights of grand jury witnesses" by excusing them from producing evidence discovered by unlawful electronic surveillance. *Id.*, at 70.

proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*, at 391, 392.

2. In support of its proposed absolute rule, the government purports to be balancing the interests by urging that the recognition of the right of a grand jury witness to assert Fourth Amendment objections would result in intolerable interference with the independent[8] proceedings of the grand jury to the great detriment of the administration of justice, while contributing little to the deterrent effect of an exclusionary rule which is of dubious efficacy anyway. This analysis loads the scales to point in favor of the government by grossly distorting the competing interests involved.

The interest at stake on the side of the victim of an illegal search and seizure subpoenaed to tell the grand jury more about it is not merely, or even primarily, the en-

[8] In fact, the grand jury is not independent of either the prosecution or the judiciary. Whatever the origins of the grand jury, it must surely be conceded that the modern day version operates under the direction and control of the prosecution, particularly as to the determination of witnesses to be called and evidence to be elicited. This Court acknowledged as much in *United States vs. Dionisio*, 410 U.S. 1, 17 (1973) when it observed that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . ." The Court has previously noted that the grand jury "remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses." *Brown vs. United States*, 359 U.S. 41, 49 (1959). See generally Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701 (1972).

hancement of the deterrent effect of the exclusionary rule[9], but rather the prevention of a further invasion of that privacy which the Fourth Amendment was designed to protect. See *Warden vs. Hayden*, 387 U.S. 294, 304 (1967); *Katz vs. United States*, 389 U.S. 347, 351 (1967). In the ordinary exclusionary rule situation, where the invasion of the victim's privacy has already been completed, this Court has pointed out that the exclusionary rule is applied only for the purpose of deterring future illegal invasions of privacy and that it does nothing to prevent, correct or restore the rupture of privacy which has already occurred. *Linkletter vs. Walker*, 381 U.S. 618, 636 (1965). Here, the government has conceded that it intends to question respondent Calandra about the items seized during the search in issue (A. 75), thereby expanding the invasion of privacy directly resulting from the illegal search and seizure.

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[9] Of course the deterrent effect of the exclusionary rule is also at stake in this case, as each exception engrafted on the Holmes dictum that illegally acquired evidence "shall not be used at all", *Silverthorne Lumber Co. vs. United States*, *supra*, at 392, enhances the government's incentive to seek such evidence. The rule sought by the government in this case (added to such previous exceptions as standing, *Alderman vs. United States*, 394 U.S. 165, 173 (1968); harmless error, *Chapman vs. California*, 386 U.S. 18, 44 n. 2 (1967) (Mr. Justice Stewart concurring); attenuation, *Wong Sun vs. United States*, 371 U.S. 471 (1963); impeachment, *Walder vs. United States*, 347 U.S. 62 (1954); and inducement of plea, cf. *McMann vs. Richardson*, 397 U.S. 759 (1970)), would certainly render the government's claim of the exclusionary rule's ineffectiveness a self-fulfilling prophecy. The adoption of the government's position in this case would provide it with the inducement for burglarizing the premises of the next Daniel Ellsberg, as well as those of his psychiatrist, where indictments are desired for their discrediting, harassing, or chilling effect on the government's "enemies".

Unlike the usual suppression situation, the cat is not yet all the way out of the bag,[10] the government, having extracted one paw by the unlawful search, now seeks to use the grand jury to extract the remainder of the feline discovered during the course of the search. Accordingly, the judgments of the district court and court of appeals, protecting Calandra from such questioning, operate to prevent a threatened further invasion of his privacy and not just to deter unrelated future episodes. This Court recognized the vital privacy interest of a witness subpoenaed before the grand jury to expand upon evidence obtained by an illegal invasion in *Gelbard vs. United States*, 408 U.S. 41 (1972):

> "Contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure." *Id.*, at 51-52.[11]

This observation applies with equal logic and is an interest entitled to even greater weight in the case of the violation of a *constitutionally* protected right. Thus, it is not this Court's devotion to the exclusionary rule *remedy*

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[10] The cat and bag metaphor has been previously employed by the Court with respect to the analogous area of confessions, observing in *United States vs. Bayer*, 331 U.S. 532 (1947) that:

"Of course, after an accused has once let the cat out of the bag by confessing . . . [h]e can never get the cat back in the bag. The secret is out for good." *Id.*, at 540.

[11] Thus the Court rejected the government's contention, strikingly similar to that advanced in this case, that:

"[t]he invasion of privacy, if any, is completed, by the time of the grand jury appearance. The questions propounded do not further invade the witness' privacy. They simply call for the kind of non-privileged evidence every citizen is obligated to provide." Brief for the United States at 30 n. 11, *United States vs. Egan*, 408 U.S. 41 (1972).

that is tested by this case, but rather its fidelity to the Fourth Amendment *right* of privacy itself that is in issue.

For its interest the government asserts that the recognition of the privilege asserted by respondent Calandra would result in intolerable interference with grand jury proceedings and a consequent breakdown in the administration of the criminal laws. However, this naked assertion is unsupported by either empirical or jurisprudential evidence of such disastrous consequences in prior experience. There is no evidence that the operation of grand juries and the administration of criminal justice have been seriously jeopardized by the extension to grand jury witnesses of traditional constitutional, statutory and common law privileges,[12] nor that the efficiency of grand juries and the administration of justice have been substantially impaired in the Sixth Circuit since the decision below, as compared to the experience in the Ninth and Second Circuits since their Courts of Appeals' divergent resolution of this issue in *Carter vs. United States,* 417 F.2d 384 (9th Cir. 1969) and *United States ex rel. Rosado vs. Flood,* 394 F.2d 139 (2nd Cir. 1968). Nor is there any evidence that this Court's decision in *Gelbard vs. United States, supra,* has resulted in the evils predicted by the government's argument *ad horrendum.*

Nor is the government's fear of protracted interruption of grand jury proceedings supported by the particular facts of this case. No such delay or interruption took place as a result of respondent Calandra's assertion of his Fourth Amendment claim. The government was required to interrupt the grand jury proceedings for an immunity hearing before the court pursuant to 18 USC §2514 (A.

[12] See cases and privileges cited at footnote 5, *supra.*

30).[13] The continuance of the hearing from August 17 to August 27 was attributable to respondent Calandra's right to advance notice under Rules 5(a), (b) and 6(d), Fed. R. Civ. P. (A. 35-36, 95a). The government admitted that the questions it intended to put to Calandra before the grand jury were based upon the items seized during the search in issue (A. 75). No "full blown suppression hearing"[14] was required, as the invalidity of the search warrant was determinable from the face of the affidavit, and the facts pertaining to the scope of the search were adduced through uncontroverted affidavits (A. 46-49). In effect, the "hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts."[15] (A. 51-80). The substantial delay incident to the government's appeal of the district court's

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[13] Even under 18 USC §6003, which apparently contemplates no immunity hearing before the court, the government would be required to interrupt the grand jury proceedings and bring the witness before the court to enforce the duty to testify. See *Brown vs. United States*, 359 U.S. 41 (1959):

"It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

"When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer. Unless, therefore, it was to be frustrated in its investigative purpose, the grand jury had to do exactly what it did—turn to the court for help. If the court had ruled that the privilege against self-incrimination had been properly invoked, that would have been the end of the matter. Even after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer." *Id.*, at 49-50.

Furthermore, the government would be required to bring the witness before the court for judicial proceedings to impose sanctions for the refusal to comply with the order to testify, pursuant to either 28 USC §1826 or Rule 42, Fed. R. Crim. P.

[14] *Gelbard vs. United States, supra*, at 70 (Mr. Justice White concurring).

[15] *Id.*, at 74 (Mr. Justice Rehnquist dissenting).

ruling is, of course attributable to the government and not to respondent Calandra.[16] In the interim the only evidence of which the grand jury has been deprived is evidence that the government concedes it would not have had but for the unlawful search and seizure (A. 75).

Nor need this Court fear that its recognition of respondent Calandra's Fourth Amendment rights would open the door to spurious Fourth Amendment claims asserted in bad faith for the purpose of delay. As noted by Mr. Justice Douglas in *Russo vs. United States,* 404 U.S. 1209 (1971), "There must be some credible evidence that the prosecution violated the law before ponderous judicial machinery is invoked to delay grand jury proceedings." *Id,* at 1210. Of seemingly equal application to Fourth Amendment claims is Mr. Justice White's dictum in *Gelbard vs. United States, supra,* precluding the utilization of spurious electronic surveillance claims for purposes of delay, that "Of course, where the government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer."[17] *Id,* at 71. The Court has indicated its faith in the ability of the judiciary to expeditiously separate the wheat from the chaff on a case by case basis with respect to newsmen's claims of a novel First Amendment privilege, *Branzburg*

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[16] Ordinarily the denial of a pre-indictment motion to suppress could not be appealed by the movant. *DiBella vs. United States,* 369 U.S. 121 (1962).

[17] Perhaps this proposition ought to be reconsidered in light of subsequent revelations about the conduct of the executive branch of the government.

vs. Hayes, 408 U.S. 665 (1972).[18] Such task could be at least as, if not more, efficaciously performed with respect to Fourth Amendment claims, made against a background of a substantial body of interpretive case law.

In short, the government has failed to show a substantial deleterious effect on the effectiveness of the grand jury such as to justify the dissipation of the substantial Fourth Amendment rights of privacy involved. The reversal sought by the government could be justified only by a naked choice of grand jury efficiency over Fourth Amendment privacy. This would be a sorry choice of values for a nation tottering on the brink of a constitutional crisis as a result of governmental disdain for that which Mr. Justice Brandeis characterized as "the right most valued by civilized men."[19] *Olmstead vs. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

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[18] See concurring opinion of Mr. Justice Powell at 710:

"Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

[19] Lest it be contended that the value of privacy has declined since the Brandeis observation, see Mr. Justice Stewart's cogent articulation of its continuing importance in *Coolidge vs. New Hampshire*, 403 U.S. 443 (1971):

"In times not altogether unlike our own they [the authors of the Constitution] won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Id.*, at 455.

B. THE VICTIM OF AN UNLAWFUL SEARCH AND SEIZURE HAS STANDING TO RAISE FOURTH AMENDMENT OBJECTIONS TO GOVERNMENT EFFORTS TO COMPEL HIM TO ANSWER QUESTIONS ABOUT THE ILLEGALLY SEIZED ITEMS, NOTWITHSTANDING THAT HE IS OFFERED IMMUNITY FROM PROSECUTION.

Unsatisfied by the evidence seized during its search of respondent Calandra's premises, the government sought to enlarge its invasion of Calandra's privacy by compelling him to appear before the grand jury to answer questions about the items seized. Calandra seeks to resist the effort, not for the purpose of preventing the introduction of evidence already disclosed, against himself or others, but rather to prevent the government from further invading his privacy, by compelling disclosure of additional matters, as a direct result of the unlawful search.

The government's contention that Calandra's privacy interest is vindicated by a grant of immunity from prosecution confuses the Fourth Amendment right (privacy) with the remedy (the exclusionary rule). Such confusion is unwarranted in the face of this Court's clear exposition of the difference between the right and the remedy in *Jones vs. United States,* 362 U.S. 257 (1960):

> "The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy." *Id.,* at 261.

Accordingly the Court defined "person aggrieved by an unlawful search and seizure", within the meaning of Rule 41(e), Fed. R. Crim. P., to mean:

> "victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Id.*[20]

That the Fourth Amendment protects the right of privacy from unreasonable searches and seizures wholly apart from their potential for incrimination was established beyond question by this Court's decision in *Camara vs. Municipal Court*, 387 U.S. 523 (1967). Thus, while a grant of immunity vindicates the constitutional interest protected by the Fifth Amendment privilege against self-incrimination, it does nothing to vindicate the right of privacy protected by the Fourth Amendment.

The government's contention that a grant of immunity deprives a grand jury witness of standing to assert his Fourth Amendment rights was specifically rejected in *Hale vs. Henkel*, 201 U.S. 43 (1906). The Court held that an immunity grant, although an adequate answer to the witness' claim of the privilege against self-incrimination, did not preclude him from asserting Fourth Amendment objections to compliance with a grand jury subpoena. The Court's ruling was predicated upon its understanding that the cases

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[20] The *Jones* definition of "person aggrieved" was subsequently held to be the constitutional standard of standing as well in *Alderman vs. United States*, 394 U.S. 165, 173 n. 6 (1968). The *Alderman* dicta that

> "There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." *Id.*, at 174,

was uttered in the context of a non-victim criminal defendant seeking to assert the Fourth Amendment rights of a third party search victim, and is not applicable to a case such as this where the victim seeks to assert his own right to prevent a further invasion of his privacy. The Court recognized this when it added:

> "The victim can and very probably will object for himself when and if it becomes important for him to do so." *Id.*

> "... treat the Fourth and Fifth Amendments as quite distinct, having different histories and performing separate functions." *Id*, at 72.

Similarly, in *United States vs. Egan*, 408 U.S. 41 (1972), this Court upheld the privacy claim of grand jury witnesses notwithstanding that they had been granted transactional immunity. *Id*, at 45.

In sum, the government's standing argument flies in the face of constitutional policy, logic and precedent, and is, in fact, frivolous.

CONCLUSION

For the foregoing reasons the judgments of the district court and court of appeals should be affirmed.

Respectfully submitted,

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July 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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Petitioner,

—v.—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide non-partisan organization of over 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-three year existence the ACLU has been concerned particularly with devices used by the Government to invade the privacy of citizens. ACLU policy stands unequivocally opposed to general warrants and dragnet searches of any person by any agency of the government whatsoever. The ACLU also opposes

* Letters of consent from the Government and from counsel for Respondent Calandra to the filing of this brief have been filed with the Clerk.

the admission of illegally obtained evidence in any legal proceeding, including a grand jury.

In the context of grand jury proceedings the ACLU believes that witnesses should have full procedural protection when questioned by a grand jury, including standing to allege invasion of their constitutional rights by the Government. The ACLU does not believe that a grant of immunity, however broad, is sufficient to protect a witness' constitutional rights. All of these issues are involved in this case.

Statement of the Case

Respondent, president of Royal Machine and Tool Company in Cleveland, was called before a special grand jury in August, 1971, eight months after the offices of his company had been thoroughly searched by governmental agents pursuant to a search warrant. After having been granted immunity pursuant to 18 U.S.C. §2514, respondent moved in the District Court to suppress material seized as a result of the search on several grounds, attacking both the warrant which was the basis for the search and the scope of the search actually conducted. The Government acknowledged the questions which it intended to ask respondent before the grand jury were based on items seized during the search.

The district court held[1] that respondent, as a witness before a grand jury, had standing to challenge the sub-

[1] The decisions below are reported, in the District Court for the Northern District of Ohio at 332 F. Supp. 737 (1971), and in the Court of Appeals for the Sixth Circuit, 465 F.2d at 1218 (1972).

poena commanding his appearance and to move for suppression, and after a hearing on the merits upheld respondent's claims and ordered the items seized suppressed, directed their return and specified that respondent need not answer any questions before the grand jury based thereon. The court of appeals unanimously affirmed, finding both that respondent had standing and "that the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause [for the search] . . . " and "that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." 465 F.2d at 1226-1227 n. 5.[2] The case is before the Court on a writ of certiorari.

[2] *Amicus* in this brief will not discuss the questions of probable cause for the warrant or scope of the search itself, as respondent, who is more familiar with the proceedings below, is better suited to discuss them. For purposes of this brief, we assume, as both lower courts found, that the search was overbroad and its authorizing warrant not supported by probable cause.

ARGUMENT

I.

A grand jury witness has a constitutional right to refuse to answer questions propounded to him when the basis for the questions is evidence obtained by means of search of his place of business conducted by the government in violation of the Fourth Amendment.

The Government contends that Respondent lacks standing to challenge the basis of the questions asked him by the grand jury. Under this proposition, the grand jury, an arm of the federal court, may ignore statutory and constitutional restrictions which protect citizens against all-encompassing government interference. This argument "reduces the Fourth Amendment to a form of words," *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 391 (1920), and must be rejected. As stated by this Court, "nothing can destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence." *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961). All facets of the rationale of the exclusionary rule, clearly applicable at trial (*Mapp* v. *Ohio, supra; Weeks* v. *United States,* 232 U.S. 383 (1914); *Elkins* v. *United States,* 364 U.S. 206 (1960)), support its application to federal grand juries as well.

A. *This witness has constitutional standing to move for suppression*

Rule 41(e) of the Federal Rules of Criminal Procedure permits "[a] person aggrieved by an unlawful search" to move in the appropriate district court for suppression of

the evidence seized. Of course, the scope of the Rule is coextensive with, and not broader than, the exclusionary rule formulated by this Court. *Alderman* v. *United States,* 394 U.S. 165, 173 n. 6 (1969); *Jones* v. *United States,* 362 U.S. 257, 261 (1960). Under *Alderman* and *Jones,* respondent herein clearly is a "person aggrieved," for it was his place of business which was illegally searched and his papers which were illegally seized. The Fourth Amendment grants to each citizen the right to be free from government-authorized searches and seizures, unless certain conditions be met:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Respondent challenged the validity of a search directly affecting the privacy of *his* "papers and effects"; as stated by this Court, he is a "victim of an invasion of privacy." *Jones* v. *United States,* 362 U.S. at 261. The invasion of his constitutional rights is clearly sufficient as a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult Constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Security of one's papers and effects is specifically "within the zone of interests to be protected by . . . the Constitutional guarantee in question," thereby assuring standing to litigate the issue. *Association*

of Data Processing Service Organizations Inc. v. *Camp*, 397 U.S. 150, 153 (1970). See also *In re Grand Jury Proceedings, Harrisburg, Pa. (Egan)*, 450 F.2d 199, 210-211 (3d Cir. 1971) (opinion of Adams, J.), *aff'd* 408 U.S. 41 (1972).

Such a witness has unquestionably suffered immediate and serious harm. He is entitled to challenge the illegal basis for the search which led to the questions posed by the grand jury because no other effective means is available to guarantee the full range of his constitutional rights or to vindicate their infringement. As more fully discussed *infra*, exclusion of the illegally seized evidence at trial does not avail a witness, such as respondent, who has been granted immunity from prosecution. Without recourse to suppression, such a witness is at the mercy of a government which may flout the Constitution with impunity.

Even if later suppression were available, delay until trial chills the First Amendment rights of the witness, his associates, and indeed any citizen who may be subjected to a general search predicated upon an unconstitutional warrant. *United States* v. *Rumely*, 345 U.S. 41 (1953); 354 U.S. 178 (1957), *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960), *Konigsberg* v. *State Bar*, 366 U.S. 36 at 73-74 (1961) (Black, J., dissenting). On the relationship between the First and Fourth Amendments, see especially *Stanford* v. *Texas*, 379 U.S. 476 (1965). These threats to fragile constitutional rights must not be tolerated. The constitutional issue is ripe for adjudication at the time the witness is called before the grand jury.

Nor does the grant of immunity to this witness in any way impair his standing to challenge the basis of grand jury questions. In *Gelbard* v. *United States*, 408 U.S. 41

(1972), this Court held that a grand jury witness has a statutory defense to a contempt citation when the grand jury questions he refused to answer were the fruits of illegal electronic surveillance. In *United States* v. *Egan*, the companion case to *Gelbard*, the witness had been granted transactional immunity from prosecution, 408 U.S. at 45. In analyzing standing to raise the statutory defense, this Court did not distinguish between Egan and Gelbard (who had not been given immunity), suggesting that immunity has no effect on standing. Furthermore, the Court of Appeals for the Third Circuit in *Egan* specifically passed on the question of whether an immunity grant vitiated a witness's standing to assent the statutory defense, holding:

> The fact that Sister Egan has been granted §2514 immunity does not deprive her of standing to raise §2515 as a defense to a proposed judgment of civil contempt, because she is not complaining of Fifth Amendment violations, but rather of Fourth Amendment ones. Surely, even though Sister Egan has been offered immunity from prosecution, she continues to have a substantial interest in preventing the Government from compounding its original violation of her privacy by forcing her to answer questions that would concededly not be asked absent the information discovered through the use of unwarranted wiretaps. (450 F.2d at 210.)

Accord, *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971). The Court of Appeals in *Egan* reached the same conclusion with respect to Egan's constitutional claim. 450 F.2d at 211-212. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of crimi-

nal behavior." *Camara* v. *Municipal Court,* 387 U.S. 523, 530 (1967).

This position is consistent with this Court's concern over the protection of Fourth Amendment rights, and logically applies with the equal force to the assertion of a constitutional as opposed to a statutory right. Clearly, no grant of immunity can adequately protect the infringement of fourth amendment rights involved in this case, especially in light of the effect on critical First Amendment rights.

It is well established that the Fourth Amendment is applicable to grand jury process. In *Hale* v. *Henkel,* 201 U.S. 43 (1906), this Court held that a grand jury subpoena for production of books and papers constituted an unreasonable search and seizure. Since *Hale* v. *Henkel,* other courts have struck down grand jury subpoenas which were unreasonable under the Fourth Amendment. *Schwimmer* v. *United States,* 232 F.2d 855, 860 (8th Cir.), *cert. denied* 352 U.S. 833 (1956); *In re Grand Jury Investigation,* 174 F. Supp. 393, 395 (S.D.N.Y. 1959); see also Fed. R. Crim. P. 17(c). The Fourth Amendment has also been applied to prohibit grand jury investigation resulting from illegally seized evidence. See *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), discussed more fully at pp. 11-13, *infra.*

Respondent's standing is clear when considering what he did *not* challenge in the district court. He did not challenge the existence of the grand jury itself, or the constitutionality of the statute, violations of which it was investigating. In this respect this case is clearly distinguishable from *Blair* v. *United States,* 250 U.S. 273 (1919). In *Blair,* a grand jury witness sought to challenge the con-

stitutionality of a federal statute as beyond the power of Congress. Of course this Court held he lacked standing to do so. Accord, *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); see also *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Here respondent challenged government action as breaching an express limitation on governmental power, the Fourth Amendment. Applying the tests of standing articulated in *Flast* v. *Cohen*, *supra*, *Baker* v. *Carr*, *supra*, and elsewhere, Calandra has standing to assert his constitutional claim.

Blair is also distinguishable on another ground. This Court has held that constitutionality of a criminal statute is not passed upon in advance of necessity. See, e.g., *United States* v. *United Automobile Workers Union*, 352 U.S. 567, 589-592 (1957). Orderly adjudication requires that such decisions be made only after full evidentiary proceedings in which the factual context of the statute's application is elaborated. That is the point of *Blair*. Here, respondent did not challenge the constitutionality of a statute under which he may at some future time be indicted; his claim is against unlawful government invasion of his rights which led directly to the questions asked him by the grand jury.

Calandra also did not challenge an indictment against him returned by a grand jury arguably on the basis of insufficient or illegally obtained evidence. Not only may such a witness not assert vicariously possible constitutional claims of others; faced with a criminal prosecution, he has available immediately an effective means of redressing an injury to him, namely, suppression or evidentiary objection at trial. Thus, *United States* v. *Blue*, 384 U.S. 251 (1966), and

Costello v. *United States,* 350 U.S. 359 (1956), are clearly distinguishable.

Finally, Calandra did not make a generalized objection to the investigative powers of grand jury (see *Blair* v. *United States,* 250 U.S. 273, 282 (1919); *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (1972)), or to the right of the public to his testimony (see *United States* v. *Bryan,* 339 U.S. 323, 331 (1950)). His objection was limited to a claim that his property be seized and his testimony be sought through lawful process, as required by the Fourth Amendment. He sought relief from the direct consequences of a specific violation of a plainly articulated constitutional right, at a time when the government was attempting to use the results of its unlawful conduct against him. As stated by Judge Miller, speaking for the court below, "we deal with a fundamental constitutional claim that is ripe." 465 F.2d at 1226.

B. *The exclusionary rule prohibits questions to this witness based upon evidence illegally seized from him*

This Court has long held that evidence obtained in violation of the Constitution may not be introduced at a federal trial. *Weeks* v. *United States,* 232 U.S. 383 (1914). This holding has been expanded to bar introduction of such evidence in state prosecutions. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). In these and other cases (see especially *Elkins* v. *United States,* 364 U.S. 206 (1960)), the Court has articulated three principal rationale for the necessity of the exclusionary rule at trial. All three support its availability to grand jury witnesses as well.

The first is "the imperative of judicial integrity." *Elkins* v. *United States, supra* at 222. See also *Weeks* v. *United*

States, supra, 232 U.S. at 394; *Harrison* v. *United States,* 392 U.S. 219, 224 n. 10 (1968). As stated by Mr. Justice Holmes, "no distinction can be made between the Government as prosecutor and the Government as judge. If the existing [criminal] code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed." *Olmstead* v. *United States,* 277 U.S. 438, 470 (dissenting opinion). A conviction based upon illegally seized evidence makes the courts "accomplices" by tacit approval in the illegality. Compare *McNabb* v. *United States,* 318 U.S. 332, 344-345 (1943). Judicial complicity in executive violations of the Constitution is no less serious when the executive seeks to use the fruits of an unconstitutional seizure to elicit further evidence from the very victim of the seizure, albeit before a grand jury rather than in open court. To countenance use of the fruits of illegal executive activity in either case tarnishes the integrity of the federal courts.

Secondly, the exclusionary rule affords the victim of an unconstitutional search and seizure the means of preventing a further invasion of his right of privacy. Use by the government of tainted evidence "infringe[s] yet further" the rights secured by the Fourth Amendment. See *Dodge* v. *United States,* 272 U.S. 530, 532 (1926); *Mapp* v. *Ohio,* 367 U.S. 643, 647-648 (1961). This is so regardless of whether further testimony is sought by the grand jury or by the prosecutor at trial. The witness's rights have been infringed; in both instances their further infringement is equally flagrant when the executive seeks exploitation of that infringement against its victim.

Silverthorne Lumber Co. v. *United States,* 251 U.S. 385 (1920), forcefully illustrates this proposition. In *Silver-*

thorne federal marshals illegally seized from the Silverthorne Lumber Company's offices all books, records and papers found there. The seized documents were copied by the government. On application, the district court ordered the originals returned but impounded the copies. The grand jury then subpoenaed the originals, and on refusal to comply, the court ordered production of the originals, despite a finding that the original seizure was unconstitutional. On appeal, this Court reversed. Speaking through Mr. Justice Holmes, the Court held (251 U.S. at 391-392):

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U.S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.*[3] (Emphasis supplied.)

[3] This holding was recently reaffirmed in *Harrison* v. *United States,* 392 U.S. 219, 222 (1968). See also *Gelbard* v. *United States,* 408 U.S. 41, 62-69 (Douglas, J., concurring).

The facts in this case are strikingly similar to those in *Silverthorne*. After illegally seizing the respondent's records, the government now seeks to compound its misdeed by asking respondent to elaborate on their contents under threat of contempt. Such a procedure surely "reduces the Fourth Amendment to a form of words," and subjects respondent to a further government intrusion, one for which a grant of immunity is scant compensation.

The third and most important foundation for the exclusionary rule is its deterrent effect on law enforcement officers:

> The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Elkins* v. *United States*, 364 U.S. at 217.

This Court in *Mapp* v. *Ohio*, overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949), held that the exclusionary rule is the only effective means of enforcing the Fourth Amendment. It is common knowledge that sovereign immunity and a notorious lack of sympathy on the part of prosecutors and juries make criminal prosecution of, or civil suits against, police officers hollow remedies for violations of a fundamental right. See *Wolf* v. *Colorado*, 338 U.S. at 41-47 (Murphy, J., dissenting). Congress has recognized this when electronic surveillance is involved. The Senate report on Title III of the Omnibus Crime Control and Safe Streets Act states:

> Section 2515 of [18 U.S.C.] imposes an evidentiary sanction to compel compliance with the other prohibitions of this chapter. It provides that intercepted wire

> or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. . . . [I]t does apply across the board in both Federal and State proceedings. And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Senate Report No. 1097, 90th Cong., 2d Sess. (1968), 2 U.S. Code Cong. and Ad. News 2112, 2184-2185.

To permit use of illegally seized evidence to compel further testimony from the victim of the seizure would truly "grant the right but in reality . . . withhold its privilege and enjoyment" (*Mapp* v. *Ohio, supra,* 357 U.S. at 656); for this would allow the prosecutor, the police and the grand jury to gather evidence without constitutional constraint and then use it extensively after obtaining a few immunity grants.[4] What citizen would be free from the threat of warrantless or general search, at any time of day or night, in his home or place of business? The injury from an unconstitutional search is not merely the use of the objects seized in a criminal prosecution against the victim;

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[4] The Government's unsupported assurance that "the instances of such international police action must be comparatively rare" (Gov't Br. at 18) is contradictory to other government arguments that the grand jury be permitted broad investigatory powers, and certainly has a very hollow ring in view of recent disclosures of extensive and carefully planned acts of illegality by the government (see pp. 15-17, *infra*). Furthermore, even an isolated case of illegal police actions does not excuse the conduct involved nor restore to its victim the constitutional rights infringed.

the damage is done when an individual's privacy is disturbed by the government. It is against precisely this intrusion that the fourth amendment protects each of us.

Judicial sanction of executive use of the fruits of its unconstitutional acts can only lead to disrespect for law generally. Over forty years ago Mr. Justice Brandeis eloquently observed:

> Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (dissenting opinion).

The continuing disclosures around the Watergate affair testify to the reality of the dangers hypothesized by Mr. Justice Brandeis, and vindicate the claims persistently put forward to this Court for the strictest construction of the Fourth Amendment.

During the past several months we have been confronted almost on a daily basis with one startling revelation after another describing actual and planned criminal conduct by government officials, in complete disregard of the Fourth Amendment and relevant criminal statutes. Thus, we know from the President's own statements (*New York Times,* May 23, 1973, p. 28) that government officials were engaged

in a massive program involving spying, wiretapping, and burglaries. We know, also from the President's own statement, that breaking and entering by government agents is not just a recent practice, but had been utilized at least from 1941 to 1966. *New York Times,* May 23, 1973, p. 28; May 24, 1973, p. 34.

We also learn from the President's own statement about the burglary of Daniel Ellsberg's files and records from the office of his psychiatrist, pursuant to the President's instruction that "as a matter of first priority, the [plumber's] unit should find out all it could about Mr. Ellsberg's associates and his motives." *New York Times,* May 23, 1973, p. 28.

In addition to the private citizens who were targets of illegal government activities in disregard of Fourth Amendment prohibitions, members of the press were also victims of spying and burglary, thereby implicating the First Amendment as well as the Fourth, as in *Stanford v. Texas, supra.* Thus, four newsmen were victims of wiretapping (Transcript of Press Conference of William D. Ruckelshaus, Acting Director, FBI, May 14, 1973, p. 2), and there was an unexecuted plan to burglarize the offices of the publisher of the *Las Vegas Times* who, according to James McCord, had "information in his safe that would be damaging to a Democratic Presidential candidate." *New York Times,* May 23, 1973, p. 30.

The Watergate relevations establish that some government officers succumb too often and too easily to the temptation to disregard the strictures embodied in the Fourth Amendment. It is only the application of the exclusionary rule that, in the context of criminal proceedings, can insure

that the government not be allowed to profit from its illegal acts, that the government will be deterred from engaging in its illegal acts, and that private citizens not be made to suffer sanctions out of the fruits of those illegal acts.

Grand jury proceedings are an integral part of federal criminal proceedings, and those who are compelled to appear before a grand jury, as the respondent here, ought to be beneficiaries of the Fourth Amendment to the same extent as if they were defendants in a criminal prosecution. There is no reason it should be otherwise, for constitutional principles and the basic notions of a democratic society must condemn and penalize illegal government conduct whatever the forum in which the fruits of illegal acts are sought to be used.

Though the case at bar is hardly as notorious as any of the adventures recounted in the course of the Watergate affair, the constitutional interests are identical and the Court must come to the conclusion that the questions cannot be asked of respondent because they are fatally tainted by illegality.

To safeguard the individual liberties guaranteed by the constitution, the exclusionary rule requires that respondent's claim be sustained.

II.

The problem of delay.

The government in its brief (pp. 12-14) complains of the "interruption and interference" to grand jury proceedings caused by judicial determination of the validity of a search warrant which led to questions asked a witness, characterizing such a determination as "collateral." Such a determination may be "collateral" to the investigation of the grand jury, just as a witness's assertion of his Fifth Amendment privilege is "collateral" to grand jury interrogation, or as a pretrial suppression hearing is "collateral" to a trial. Courts have long held that such "collateral" adjudication is available to challenge grand jury process on grounds of privilege (e.g., *Blau* v. *United States,* 340 U.S. 332 (1951) (husband-wife privilege); *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963) (attorney-client privilege); Comment, The Rights of a Witness before a Grand Jury, 1967 Duke L. J. 97, 121-122) as well as on constitutional grounds. *Hale* v. *Henkel, supra; Silverthorne Lumber Co.* v. *United States, supra.* Congress has expressly provided for "collateral" litigation of the basis for grand jury questions where the questions may be based upon illegal electronic surveillance. 18 U.S.C. §2515; *Gelbard* v. *United States,* 408 U.S. at 46-52. The investigatory and interrogatory powers of the grand jury are necessarily broad, but they are not boundless; and the grand jury itself, with no member of the judiciary present during its exercise of these powers, was not meant to evaluate the rights of individuals. It is the supervisory federal court, under whose authority the grand jury is convened, which must balance

an individual's rights against society's interest in "a thorough and extensive investigation" (*Wood* v. *Georgia,* 370 U.S. 375, 392 (1962)). "Interference" of the sort alleged by the Government is thus a necessary and long-recognized guard against overzealous grand jury activities.

There is no reason to believe that adjudication of a constitutional claim such as Calandra's will unduly prolong or disrupt grand jury proceedings. Unlike a case involving electronic surveillance, the Government need not search its records to ascertain whether the questions were based upon a particular wiretap. District courts are frequently called upon to evaluate probable cause for a search warrant during pretrial suppression hearings. This Court has established workable standards for determination of both probable cause for a warrant and scope of searches conducted. See, e.g., *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *United States* v. *Ventresca,* 380 U.S. 102 (1965); *Stanford* v. *Texas, supra.* The vast majority of witnesses do not and will not in the future refuse to respond to grand jury interrogation. Should a future hostile witness assert a frivolous Fourth Amendment claim, a suppression or contempt hearing will take no longer than the prosecutor's representation that no illegal search took place. An obstructionist witness can, of course, be compelled to answer once the government demonstrates that any search conducted was pursuant to and in compliance with the terms of a lawful warrant. *Gelbard* v. *United States,* 408 U.S. at 71 (White, J., concurring); *In re Evans,* 452 F.2d at 1246-1247.

Finally, any incidental delay occasioned by a suppression hearing is a feeble counterweight indeed when balanced against the witness's constitutional right to be free

from unauthorized government interference. "The grand jury's operation—and indeed our entire criminal process—could be streamlined if our laws and the constitution left room for draconian efforts to obtain evidence from defendants or witnesses," *In re Evans*, 452 F.2d at 1249; our laws and the constitution, however, place an individual's rights above such streamlined efficiency of the criminal process. This question was carefully considered by the court below in this case, whose trenchant analysis merits quotation at length:

> The [district court] has properly focused upon the serious flaw of the Government's position. Increasingly, our criminal process is concerned not with the isolated individual event but with matters of considerable scope involving numerous persons, some of whom are central to the suspected or alleged crime and some of whom are not. Specifically, this tendency is a result of the increasing concern of law enforcement with "organized crime" and with conspiracies whether connected with commerce or with violence. Under such circumstances, it is both logical and proper that police should concentrate their greatest effort on the key figures rather than "small fry" of suspected criminal activity. For example, it is agreed that the key to dealing adequately with the trade in heroin is not the "pusher on the street." Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise, is natural and understandable.
>
> It is, however, precisely this temptation which the Fourth Amendment and the exclusionary rule were de-

vised to restrain. The Fourth Amendment reflects a considered decision that, in our scheme of government, the individual's right to privacy shall not invariably give way to what is deemed most efficient and expedient in the prosecution of crime. Suppression of the fruit of the violation of that right to privacy, for example, has been considered the most effective means of dealing with the temptation to violate it.

The importance of suppression as a device is directly proportional to the incentive that exists to violate the right. Where, as here, the incentive is greatest, access to the motion to suppress attains maximum importance. 465 F.2d at 1226.

Efficiency of the criminal process must yield to constitutional and statutory limits on governmental power.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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August 1973

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-734

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

We deem it appropriate to make a short reply to respondent's brief. We here focus on the argument that, whatever the propriety of allowing the grand jury to consider the physical records seized from him, respondent cannot be required to testify before the grand jury because the information which prompted his subpoena and which will provide a basis for questioning him derived from the allegedly unlawful search and seizure.[1] Subpoenaing and questioning him on the basis of such information, the argument runs, constitute additional Fourth Amendment invasions distinct from the initial invasion of privacy.

1. This novel proposition misconceives the function of the Fourth Amendment. Its purpose is not to make relevant evidence inaccessible. The Amendment in no

[1] As we pointed out in our main brief (Br. 8), while we believe the search and seizure were valid, we do not ask this Court to review this issue.

way qualifies the rule that the grand jury is entitled to every man's evidence. Insofar as it bears on criminal investigations, the Fourth Amendment is primarily concerned with means: it assures that relevant evidence shall not be obtained in ways that unreasonably intrude on privacy. But—with perhaps very rare exceptions, cf. *Griswold* v. *Connecticut,* 381 U.S. 479, 484; *Warden* v. *Hayden,* 387 U.S. 294, 303-the Amendment itself excludes no document or information merely because of its "private" character. See *Katz* v. *United States,* 389 U.S. 347, 350-351.

Normally, the Fourth Amendment is not implicated when evidence is sought to be obtained by subpoena. To be sure, a demand for records may be so wide-ranging as to impose an undue burden—absent special justification—and the Court has interposed the Fourth Amendment in that situation. *Hale* v. *Henkel,* 201 U.S. 43. In the circumstances of the present case, however, there would have been no arguable Fourth Amendment objection to subpoenaing the limited records in suit—whatever the violation involved in obtaining them in the search of respondent's business premises. Nor is there now any basis for invoking the Fourth Amendment as a bar to calling respondent as a witness before the grand jury.

It is no sound objection that questioning respondent will breach his privacy and compel him to make disclosure of matters he would rather keep to himself. That is simply a necessary sacrifice which every citizen is required to make for the sake of justice. Except only for specially privileged matter, the law compels every man to contribute whatever relevant information he may have, however embarrassing or unpleasant the duty. See *United States* v. *Dionisio,* 410 U.S. 1, 9; *Branzburg* v. *Hayes,* 408 U.S. 665, 688.

Whatever privileges may excuse a witness from responding to particular questions in a grand jury proceeding, the Fourth Amendment itself confers no immunity from compulsory testimony. In *Katz* v. *United States, supra,* the Court held that surreptitious eavesdropping on unguarded private conversations may violate the constitutional rule. But it has never been suggested that *compelled testimony* is in any way regulated by the Fourth Amendment.[2] Else, "probable cause" would be a prerequisite to calling a witness, or requiring a response, in every proceeding, whether administrative, legislative, or judicial, civil or criminal. And that, of course, is not the law. See *United States* v. *Dionisio, supra,* 410 U.S. at 9-13; *Branzburg* v. *Hayes, supra,* 408 U.S. at 701-706; *United States* v. *Powell,* 379 U.S. 48, 57, and cases there cited.

2. This disposes of respondent's claim that requiring him to answer grand jury questions would constitute a fresh invasion of his Fourth Amendment rights. Although respondent is at pains to avoid it (Br. 9, 10), the real threshold issue in this case is whether the *exclusionary rule* fashioned to deter violations of the Amendment should be extended to bar grand jury questions based on illegally obtained evidence. We have fully dealt with this matter in our original brief and do not repeat that discussion here. It may be appropriate, however, to add a word about *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, on which respondent so heavily relies.

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[2] Arguably, an exception might be made for compelled testimony that is sought as a *substitute* for written records, the production of which could be resisted under the Fourth Amendment. See Mr. Justice Douglas, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 64 n. 1. But that is not our situation: we are here addressing respondent's complaint that he will be required to reveal information *beyond* what the seized records show.

The first thing to be said about *Silverthorne* is that it had nothing whatever to do with *new* evidence sought to be elicited from the victim of a Fourth Amendment violation. The situation there was that of two indicted individuals, whose papers had been seized "without a shadow of authority" and ordered returned, who were now objecting to the government's attempt to recapture the very same papers by issuing a subpoena in the name of the grand jury. Accordingly, that decision does not support respondent's objection to testifying to matters not immediately disclosed by the the seized records.

Nor does *Silverthorne* govern our case even with respect to the records seized in the allegedly illegal search. For here there are two critical differences: as we stress in our main brief, no Fourth Amendment violation had been established before the grand jury proceedings were under way; and respondent, unlike the Silverthornes, has been offered immunity and therefore cannot be legally injured by the grand jury's consideration of his papers.[3]

We recognize, of course, that some of the sweeping language of the *Silverthorne* opinion, especially the epigramatic conclusion that illegally obtained evidence "shall not be used at all," can be stretched further. But that *dictum*—unnecessary to the decision—has not,

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[3] Contrary to respondent's assertion (Br. 17-18), *Hale* v. *Henkel*, *supra*, does not foreclose our argument that a grant of immunity deprives a grand jury witness of standing to invoke the exclusionary rule. First, that case involved no application of the exclusionary rule, but the quite distinct claim that compliance with the subpoena would itself invade Fourth Amendment rights. Moreover, that claim was in fact rejected as to the immunized individual witness. 201 U.S. at 73-77.

in fact, been followed by this Court in applying the exclusionary rule. Respondent concedes as much (Br. 10, n. 9). We submit there is no occasion here to apply *Silverthorne* beyond its own facts.

Finally, if it were necessary to do so—we think not—we would urge that *Silverthorne* was wrongly decided and that the force of the precedent has been eroded by subsequent decisions. Indeed, except for the earlier illegality, there does not seem to have been any Fourth Amendment obstacle to the subpoena for the Silverthorne papers and, as our main brief demonstrates, no subsequent ruling of this Court suggests that—absent a special statutory provision—the exclusionary rule applies to grand jury proceedings. See Mr. Justice White, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 70. In these circumstances, it is difficult to justify the *Silverthorne* result. Nevertheless, should the Court determine to leave the *Silverthorne* holding unimpaired, it would be inappropriate, we think, to extend its logic to dissimilar cases.

For the reasons stated here and in our main brief, the judgment below should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Special Assistant to the Attorney General.

OCTOBER 1973.

Syllabus

UNITED STATES v. MAZE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1168. Argued November 13-14, 1973—
Decided January 8, 1974

Respondent was convicted of violating the federal mail fraud statute, 18 U. S. C. § 1341, by devising a scheme to defraud through unlawfully obtaining possession from one Meredith of a credit card issued by a Louisville bank, which respondent used to obtain goods and services from motel operators in various States knowing that the operators to whom he presented the card for payment would mail the sales slips to the Louisville bank, which would in turn mail them to Meredith. Section 1341 makes it a crime, *inter alia*, for a person who has devised a scheme to defraud or for obtaining money or property by means of false pretenses for the purpose of executing the scheme knowingly to cause to be delivered by mail according to the direction thereon any thing delivered by the Postal Service. The Court of Appeals reversed the judgment of conviction on the ground that § 1341 was inapplicable to respondent's conduct. *Held:* The mailings were not sufficiently closely related to respondent's scheme to bring his conduct within the statute. Though mailings were to be directed to adjusting the accounts between respondent's victims (the motels, the Louisville bank, and Meredith), they were not for the purpose of executing the scheme embraced by the statute since that scheme had already reached fruition when respondent checked out of the motel and did not depend on which of his victims ultimately bore the loss. *Pereira* v. *United States*, 347 U. S. 1; *United States* v. *Sampson*, 371 U. S. 75, distinguished. Pp. 398-405.

468 F. 2d 529, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 405. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined, *post*, p. 408.

Jewel S. Lafontant argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

William T. Warner, by appointment of the Court, *post,* p. 997, argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In February 1971 respondent Thomas E. Maze moved to Louisville, Kentucky, and there shared an apartment with Charles L. Meredith. In the spring of that year respondent's fancy lightly turned to thoughts of the sunny Southland, and he thereupon took Meredith's BankAmericard and his 1968 automobile and headed for Southern California. By presenting the BankAmericard and signing Meredith's name, respondent obtained food and lodging at motels located in California, Florida, and Louisiana. Each of these establishments transmitted to the Citizens Fidelity Bank & Trust Co. in Louisville, which had issued the BankAmericard to Meredith, the invoices representing goods and services furnished to respondent. Meredith, meanwhile, on the day after respondent's departure from Louisville, notified the Louisville bank that his credit card had been stolen.

Upon respondent's return to Louisville he was indicted on four counts of violation of the federal mail fraud statute, 18 U. S. C. § 1341, and one count of violation of the Dyer Act, 18 U. S. C. § 2312. The mail-fraud counts of the indictment charged that respondent had devised a scheme to defraud the Louisville bank, Charles L. Meredith, and several merchants in different States by unlawfully obtaining possession of the BankAmericard issued by the Louisville bank to Meredith, and using the card to obtain goods and services. The indictment charged that respondent had obtained goods and services

at four specified motels by presenting Meredith's Bank-Americard for payment and representing himself to be Meredith, and that respondent knew that each merchant would cause the sales slips of the purchases to be delivered by mail to the Louisville bank which would in turn mail them to Meredith for payment. The indictment also charged that the delay in this mailing would enable the respondent to continue purchasing goods and services for an appreciable period of time.

Respondent was tried by a jury in the United States District Court for the Western District of Kentucky. At trial, representatives of the four motels identified the sales invoices from the transactions on Meredith's Bank-Americard which were forwarded to the Louisville bank by their motels. An official of the Louisville bank testified that all of the sales invoices for those transactions were received by the bank in due course through the mail, and that this was the customary method by which invoices representing BankAmericard purchases were transmitted to the Louisville bank. The jury found respondent guilty as charged on all counts, and he appealed the judgment of conviction to the Court of Appeals for the Sixth Circuit. That court reversed the judgment as to the mail fraud statute, but affirmed it as to the Dyer Act. 468 F. 2d 529 (1972).[1] Because of an apparent conflict among the courts of appeals as to the circumstances under which the

[1] The Court of Appeals determined that even though it affirmed respondent's Dyer Act conviction, for which he had received a concurrent five-year sentence, it should also consider the mail fraud convictions as well. There is no jurisdictional barrier to such a decision, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and the court decided that "no considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony." 468 F. 2d 529, 536 n. 6. We agree that resolution of the mail fraud questions presented by this case is appropriate.

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fraudulent use of a credit card may violate the mail fraud statute,[2] we granted the Government's petition for certiorari. 411 U. S. 963 (1973). For the reasons stated below, we affirm the judgment of the Court of Appeals.

The applicable parts of the mail fraud statute provide as follows: [3]

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

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[2] The decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Lynn*, 461 F. 2d 759 (1972), appears consistent with the decision of the Sixth Circuit in the instant case. Five other courts of appeals apparently take a contrary view. *E. g.*, *United States* v. *Kellerman*, 431 F. 2d 319 (CA2), cert. denied, 400 U. S. 957 (1970); *United States* v. *Chason*, 451 F. 2d 301 (CA2 1971), cert. denied, 405 U. S. 1016 (1972); *United States* v. *Madison*, 458 F. 2d 974 (CA2), cert. denied, 409 U. S. 859 (1972); *United States* v. *Ciotti*, 469 F. 2d 1204 (CA3 1972), cert. pending, No. 72-6155; *Adams* v. *United States*, 312 F. 2d 137 (CA5 1963); *Kloian* v. *United States*, 349 F. 2d 291 (CA5 1965), cert. denied, 384 U. S. 913 (1966); *United States* v. *Reynolds*, 421 F. 2d 178 (CA5 1970); *United States* v. *Thomas*, 429 F. 2d 407 (CA5 1970); *United States* v. *Kelly*, 467 F. 2d 262 (CA7 1972), cert. denied, 411 U. S. 933 (1973); *United States* v. *Kelem*, 416 F. 2d 346 (CA9 1969), cert. denied, 397 U. S. 952 (1970).

[3] The full text of the section reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

> money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any [matter or thing whatever to be sent or delivered by the Postal Service] shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

In *Pereira* v. *United States*, 347 U. S. 1, 8–9 (1954), the Court held that one "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . . ." We assume, as did the Court of Appeals, that the evidence would support a finding by the jury that Maze "caused" the mailings of the invoices he signed from the out-of-state motels to the Louisville bank. But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute.[4]

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such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

[4] The Government indicates that in 1969 it was estimated that more than 300 million consumer credit cards were in circulation, with annual charges between $40 billion and $60 billion. It was also estimated that, in 1969, 1.5 million cards were lost or stolen, and that losses due to fraud had risen from $20 million in 1966 to $100 million in 1969. Brief for United States 14 n. 2, citing 115 Cong. Rec. 38987 (1969). The mail fraud statute, first enacted in 1872, c. 335, § 301, 17 Stat. 323, while obviously not directed at credit card frauds as such, is sufficiently general in its language to include them if the requirements of the statute are otherwise met.

Under the statute, the mailing must be "for the purpose of executing the scheme, as the statute requires," *Kann* v. *United States*, 323 U. S. 88, 94 (1944), but "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element," *Pereira* v. *United States*, *supra*, at 8. The Government relies on *Pereira*, *supra*, and *United States* v. *Sampson*, 371 U. S. 75 (1962), to support its position, while respondent relies on *Kann* v. *United States*, *supra*, and *Parr* v. *United States*, 363 U. S. 370 (1960).

In *Kann*, *supra*, corporate officers and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As a part of the scheme, the defendants were accused of having fraudulently obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which defendants cashed the checks:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." 323 U. S., at 94.

In *Parr*, *supra*, the defendants were charged, *inter alia*, with having obtained gasoline and other products and services for their own purposes by the unauthorized use of a gasoline credit card issued to the school district which employed them. The oil company which furnished products and services to the defendants would

mail invoices to the school district for payment, and the school district's payment was made by check sent in the mail. Relying on *Kann*, the Court again found that there was not a sufficient connection between the mailing and the execution of the defendants' scheme, because it was immaterial to the defendants how the oil company went about collecting its payment.

The defendant in *Pereira, supra*, was charged with having defrauded a wealthy widow of her property after marrying her. The Court describes the conduct of defendant in these words:

> "Pereira asked his then wife if she would join him in the hotel venture and advance $35,000 toward the purchase price of $78,000. She agreed. It was then agreed, between her and Pereira, that she would sell some securities that she possessed in Los Angeles, and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles, and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000 was drawn in favor of Pereira." 347 U. S., at 5.

Thus the mailings in *Pereira* played a significant part in enabling the defendant in that case to acquire dominion over the $35,000, with which he ultimately absconded.[5]

[5] While it is clearly implied in this Court's opinion in *Pereira* that the El Paso bank did not immediately credit the account of the defendant, but instead awaited advice from the Los Angeles bank to which it had mailed the check, the opinion of the Court of Appeals for the Fifth Circuit in *Pereira* makes that fact abundantly clear:

"The return of [the] check from Texas to California constitutes the mailing referred to in the First Count . . . . In mailing the

Unlike the mailings in *Pereira*, the mailings here were directed to the end of adjusting accounts between the motel proprietor, the Louisville bank, and Meredith, all of whom had to a greater or lesser degree been the victims of respondent's scheme. Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss.[6] Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

The Government, however, relying on *United States* v. *Sampson*, *supra*, argues that essential to the success of any fraudulent credit-card scheme is the "delay" caused by use of the mails "which aids the perpetrator . . . in the continuation of a fraudulent credit card scheme and the postponement of its detection." In *Sampson*, various employees of a nationwide corporation were charged with a scheme to defraud businessmen by obtaining advance fees on the promise that the defendants would either help the businessmen to obtain loans or to sell their businesses. Even after the checks representing the fees had been deposited to the accounts of

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check back to the bank in California on which it was drawn, the El Paso, Texas, bank sent 'instructions to wire fate,' meaning to wire whether the item was paid or not. Upon receiving a telegram stating that the check had been paid, the bank in El Paso gave Pereira its cashier's check for $35,286.01, which Pereira promptly cashed on June 19, 1951." *Pereira* v. *United States*, 202 F. 2d 830, 836 (1953).

[6] MR. JUSTICE WHITE's dissenting opinion indicates that respondent engaged in a "two week, $2,000 transcontinental spending spree." While we are not sure of the legal significance of the amounts fraudulently charged on the credit card by the respondent, we note that the four counts of mail fraud charged in the indictment were based on charges on Meredith's credit card totaling $301.85. Brief for Respondent 4 n. 2; Brief for United States 4–5.

the defendants, however, the plan called for the mailing of the accepted application together with a form letter assuring the victims that the services for which they had contracted would be performed. The Court found that *Kann* and *Parr* did not preclude the application of the mail fraud statute to "a deliberate, planned use of the mails after the victims' money had been obtained." 371 U. S., at 80.

We do not believe that *Sampson* sustains the Government's position. The subsequent mailings there were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place. But the successful completion of the mailings from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service,[7] which causes the time lag in the physical transmission of such correspondence.[8]

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[7] Since we are admonished that we may not as judges ignore what we know as men, we do not wish to be understood as suggesting that delays in mail service are solely attributable to the distance involved. If the Postal Service appears on occasion to be something less than a 20th century version of the wing-footed Mercury, the fact remains that the invoices were mailed to and were ultimately received by the Louisville bank.

[8] Distance is not the only cause of delay. The Court of Appeals noted that BankAmericard had a billing system in which billing was

Congress has only recently passed an amendment to the Truth in Lending Act [9] which makes criminal the use of a fraudulently obtained credit card in a "trans-

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accomplished by collecting receipts over a one-month period and then billing the card holder. 468 F. 2d, at 535. It might reasonably be argued that respondent himself used facilities of interstate travel for the purpose of executing his scheme, since the large distances separating the defrauded motels from one another and from the Louisville bank probably did make it more difficult to apprehend him than if he had simply defrauded local enterprises in Louisville. But the statute is cast, not in terms of use of the facilities of interstate travel, but in terms of use of the mails.

[9] Volume 84 Stat. 1127, 15 U. S. C. § 1644 provides:

"Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The Court of Appeals felt that the enactment by Congress of the above amendment to the Truth in Lending Act manifested a legislative judgment that credit card fraud schemes were to be excluded from the application of the mail fraud statute "unless the offender makes a purposeful use of the mails to accomplish his scheme." 468 F. 2d, at 536.

Respondent contends that the passage of the amendment indicates that Congress believed in 1970 that credit card fraud was not a federal crime under 18 U. S. C. § 1341 or otherwise. Respondent also notes that the legislative history of the passage of the amendment indicates that the original bill, as enacted by the Senate, contained no jurisdictional amount limitation. The Senate-House conferees, at the request of the Department of Justice, later added the limitation of federal jurisdiction under the section to purchases exceeding $5,000. Brief for Respondent 16–21.

The Government contends that the Court of Appeals erred in attaching significance to the 1970 amendment, urging that there is no indication that Congress intended its provisions to be the sole vehicle for the federal prosecution of credit card frauds. Brief for

action affecting interstate or foreign commerce." 84 Stat. 1127, 15 U. S. C. § 1644. Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme.[10] But it did not do this; instead, it required that the use of the mails be "for the purpose of executing such scheme or artifice . . . ." Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals is

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE joins, dissenting.

I join in the dissent of MR. JUSTICE WHITE which follows but add a few observations on an aspect of the Court's holding which seems of some importance. Section 1341 of Title 18, U. S. C., has traditionally been used against fraudulent activity as a first line of defense. When a "new" fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal

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United States 33–37, citing *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45 (1952).

We deem it unnecessary to determine the significance of the passage of the amendment, since we conclude without resort to that fact that the mail fraud statute does not cover the respondent's conduct in this case.

[10] We are admonished by THE CHIEF JUSTICE in dissent that the "mail fraud statute must remain strong to be able to cope with the new varieties of fraud" which threaten "the financial security of our citizenry" and which "the Federal Government must be ever alert to combat." We believe that under our decision the mail fraud statute remains a strong and useful weapon to combat those evils which are within the broad reach of its language. If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court.

on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil. "Prior to the passage of the 1933 [Securities] Act, most criminal prosecutions for fraudulent securities transactions were brought under the Federal Mail Fraud Statute." Mathews, Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases, 39 Geo. Wash. L. Rev. 901, 911 (1971). Loan sharks were brought to justice by means of 18 U. S. C. § 1341, Lynch, Prosecuting Loan Sharks Under the Mail Fraud Statute, 14 Ford. L. Rev. 150 (1945), before Congress, in 1968, recognized the interstate character of loansharking and the need to provide federal protection against this organized crime activity, and enacted 18 U. S. C. § 891 *et seq.*, outlawing extortionate extensions of credit. Although inadequate to protect the buying and investing public fully, the mail fraud statute stood in the breach against frauds connected with the burgeoning sale of undeveloped real estate, until Congress could examine the problems of the land sales industry and pass into law the Interstate Land Sales Full Disclosure Act, 82 Stat. 590, 15 U. S. C. § 1701 *et seq.* Coffey & Welch, Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth, 21 Case W. Res. L. Rev. 5 (1969). Similarly, the mail fraud statute was used to stop credit card fraud, before Congress moved to provide particular protection by passing 15 U. S. C. § 1644.

The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct. Mail fraud counts fill pages of securities fraud indictments even today. Mathews, 39 Geo. Wash. L. Rev., at 911. Despite the pervasive Gov-

ernment regulation of the drug industry, postal fraud statutes still play an important role in controlling the solicitation of mail-order purchases by drug distributors based upon fraudulent misrepresentations. Hart, The Postal Fraud Statutes: Their Use and Abuse, 11 Food Drug Cosm. L. J. 245, 247, 261 (1956). Maze's interstate escapade—of which there are numberless counterparts—demonstrates that the federal mail fraud statute should have a place in dealing with fraudulent credit card use even with 15 U. S. C. § 1644 on the books.

The criminal mail fraud statute must remain strong to be able to cope with the new varieties of fraud that the ever-inventive American "con artist" is sure to develop. Abuses in franchising and the growing scandals from pyramid sales schemes are but some of the threats to the financial security of our citizenry that the Federal Government must be ever alert to combat. Comment, Multi-Level or Pyramid Sales Systems: Fraud or Free Enterprise, 18 S. D. L. Rev. 358 (1973).

The decision of the Court in this case should be viewed as limited to the narrow facts of Maze's criminal adventures on which the Court places so heavy a reliance, and to the Court's seeming desire not to flood the federal courts with a multitude of prosecutions for relatively minor acts of credit card misrepresentation considered as more appropriately the business of the States. The Court of Appeals, whose judgment is today affirmed, was careful to state that "[w]e do not hold that the fraudulent use of a credit card can never constitute a violation of the mail fraud statute." 468 F. 2d 529, 536 (1972). The Court's decision, then, correct or erroneous, does not mean that the United States ought, in any way, to slacken its prosecutorial efforts under 18 U. S. C. § 1341 against those who would use the mails in schemes to defraud the guileless members of the public with

worthless securities, patent medicines, deeds to arid and inaccessible tracts of land, or other empty promises of instant wealth and happiness. I agree with MR. JUSTICE WHITE that the judgment of the Court of Appeals was error and should be reversed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN concur, dissenting.

Until today the acts charged in the indictment in this case—knowingly causing four separate sales invoices to be mailed by merchants to the bank that had issued the stolen BankAmericard in furtherance of a scheme to defraud the bank by using the credit card without authorization and by falsely securing credit—would have been a criminal offense punishable as mail fraud under 18 U. S. C. § 1341.[1] But no more. By misreading this Court's prior decisions and giving an unambiguous federal criminal statute an unrealistic reading, the majority places beyond the reach of the statute a fraudulent scheme that by law is not consummated until after the mails have been used, that utilizes the mails as a cen-

[1] See, *e. g.*, *United States* v. *Kelly*, 467 F. 2d 262 (CA7 1972), cert. denied, 411 U. S. 933 (1973); *United States* v. *Madison*, 458 F. 2d 974 (CA2), cert. denied, 409 U. S. 859 (1972); *United States* v. *Chason*, 451 F. 2d 301 (CA2 1971), cert. denied, 405 U. S. 1016 (1972); *United States* v. *Kellerman*, 431 F. 2d 319 (CA2), cert. denied, 400 U. S. 957 (1970); *United States* v. *Thomas*, 429 F. 2d 407 (CA5 1970); *United States* v. *Kelem*, 416 F. 2d 346 (CA9 1969), cert. denied, 397 U. S. 952 (1970); *Adams* v. *United States*, 312 F. 2d 137 (CA5 1963).

The majority recognizes that prior to this decision at least five courts of appeals had taken a view contrary to that reached by the court below. *Ante*, at 398 n. 2. The Court of Appeals in this case relied upon *United States* v. *Lynn*, 461 F. 2d 759 (CA10 1972), but the indictment in that case did not allege that the plan defrauded the authorized card holder or the credit card issuer.

tral, necessary instrumentality in its perpetration, and that demands federal investigatory and prosecutorial resources if it is to be effectively checked. Because I cannot subscribe to the majority's reasoning or the result it reaches, I dissent.

As "part of his scheme and artifice to defraud," respondent was charged with "obtain[ing] property and services on credit through the use of" an unlawfully possessed BankAmericard and "by means of false and fraudulent pretenses, representations and promises . . . ." App. 5, 6. The property and services were obtained from Citizens Fidelity Bank and Trust Company of Louisville, Kentucky, a BankAmericard licensee, Charles Meredith, the authorized card holder and user, and various persons and business concerns "which had previously entered into agreements with BankAmericard to furnish property and services on credit to the holders of BankAmericards . . . ." *Id.*, at 6. The indictment also charged that the mails played an indispensable role in respondent's fraudulent activities:

> "It was a further part of his scheme and artifice to defraud that the defendant would and did obtain property and services on credit through the use of [the] BankAmericard . . . by charging purchases on credit, well knowing at the time that the bank copies of the sales invoices recording these purchases would be, and were, delivered by mail to Citizens Fidelity Bank and Trust Company, Louisville, Kentucky, according to the directions thereon for posting to the BankAmericard account of Charles L. Meredith, that copies of these sales invoices, together with a bill for the accumulated charges, would subsequently be mailed in the normal course of business to Charles L. Meredith; and that the delay inherent in this posting and mailing would enable

the defendant to continue to make purchases with [the] BankAmericard . . . before his scheme and artifice to defraud could be detected." *Id.*, at 6–7.

I

Section 1341 proscribes use of the mails "for the purpose of executing" a fraudulent scheme. The trial court had instructed the jury that it could convict on the four mail fraud counts only if it found, *inter alia*, that "the mails were in fact used *to carry out* the scheme and that the use of the mails was reasonably foreseeable. The mail matter need not disclose on its face a fraudulent representation or purpose, but need only be intended *to assist in carrying out* the scheme to defraud." App. 37 (emphasis added). Viewing each fraudulent transaction as consummated at the time respondent received goods in exchange for signing the BankAmericard sales drafts, the Court of Appeals held that respondent did not cause the subsequent mailings "for the *purpose* of executing his fraudulent scheme." 468 F. 2d 529, 535 (emphasis in original). The court below acknowledged that "the fraud was directed against the card issuer and the card holder," but it nevertheless concluded that the relevant perspective was respondent's. "As far as [respondent] was concerned, his transaction was complete when he checked out of each motel; the subsequent billing was merely 'incidental and collateral to the scheme and not a part of it.'" *Id.*, at 534, quoting *Kann* v. *United States*, 323 U. S. 88, 95 (1944).

The majority has uncritically embraced this unnecessarily restrictive approach to construing the statute. Like the Court of Appeals, it has selectively seized upon language in our prior decisions in pursuit of its notion that the fraudulent scheme ended when respondent duped

the motels into giving him goods and services on credit. We are told, for example, as in *Kann, supra,* where the mails were used to deliver checks drawn from a dummy corporation as part of a scheme by corporate officers to defraud their own corporation, that the scheme here "had reached fruition," that the person "intended to receive the [goods and services] had received it irrevocably," that it was "immaterial . . . to any consummation of the scheme" how the sales invoices were forwarded by the motels to the issuing bank for payment and billing to the card holder, and that the so-called billing process was, as previously noted, "incidental and collateral to the scheme and not a part of it." 323 U. S., at 94, 95. "Therefore, only if the mailings were 'a part of the execution of the fraud,' or, as we said in *Pereira* v. *United States,* 347 U. S. 1, 8, were 'incident to an essential part of the scheme,' do they fall within the ban of the federal mail fraud statute." *Parr* v. *United States,* 363 U. S. 370, 390 (1960).

What the majority overlooks is the salient fact that the fraud in this case—and most others involving unauthorized use of credit cards—was practiced on the card issuer and not on the individual merchants who furnished lodgings and meals to respondent. As the Court of Appeals itself recognized, "[t]he merchants who honored the BankAmericard were likely insulated from loss under their agreements with BankAmericard. *See* Brandel & Leonard, Bank Charge Cards: New Cash or New Credit, 69 Mich. L. Rev. 1033, 1040 (1971)." 468 F. 2d, at 534 n. 3.[2] Here, then, the fraud was ulti-

[2] Almost all of the bank credit card systems presently in operation in this country rely upon a three-way transaction between the card issuer, the cardholder, and a subscribing retailer. This tripartite credit card arrangement basically entails three separate contractual

mately perpetrated upon the credit card issuer and not the merchant.[3] The mails thus became "part of the execution of the fraud . . . ." *Kann* v. *United States*,

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agreements: (1) between the bank issuing the credit card and the individual cardholder; (2) between one of the banks in the system and a local merchant; and (3) between the merchant and the cardholder. See generally Comment, The Tripartite Credit Card Transaction: A Legal Infant, 48 Calif. L. Rev. 459 (1960).

"The most important of the many parties to such a system is the bank which issues the charge cards to the public. The issuer-bank establishes an account on behalf of the person to whom the card is issued, and the two enter into an agreement which governs their relationship. This agreement establishes a line of credit under which the cardholder may incur obligations to the issuer by a cash advance or through a purchase of goods or services from one of the merchant-members.

"These merchants also have an agreement with the banks requiring them to honor all charge cards issued by a member-bank, and enabling them to deposit slips evidencing sales to cardholders in an ordinary checking account at the bank with which he has reached an agreement in return for a discounted credit to that account. These slips are then cleared and forwarded through an interchange system to the member-bank which originally issued the card and from which the cardholder will be billed periodically. The cardholder must then decide whether to make payment in full within a specified period, free of finance charges, or to defer payment and ultimately be charged an extra percentage of the amount billed." Comment, Bank Credit Cards—Contemporary Problems, 41 Fordham L. Rev. 373, 374 (1972) (footnote omitted).

Because the legal relationship between the parties is dictated by the terms of their respective agreements, the contract governs the distribution of risk for credit card frauds between the merchant and the issuer. Under most systems, with certain exceptions for negligence on the part of the merchant if he honors an expired card or one appearing on the current "stop list" or if he makes a sale for an amount in excess of the cardholder's credit line, the issuer assumes all risks for frauds. Murray, A Legal-Empirical Study of the Unauthorized Use of Credit Cards, 21 U. Miami L. Rev. 811, 813 (1967); Note, Credit Cards: Distributing Fraud

[*Footnote 3 is on p. 418*]

supra, at 95. Indeed, they were "an essential element" and not merely "incident to an essential part of the scheme . . . ." *Pereira* v. *United States*, 347 U. S. 1, 8 (1954).

Nor had respondent's plan reached fruition. For his part, he may very well not have schemed beyond obtaining the goods and services under false pretenses with a stolen credit card. But from a legal standpoint of criminal fraud, this was only the first and certainly

> "not the last step in the fraudulent scheme. It was a continuing venture. . . . The use of the

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Loss, 77 Yale L. J. 1418, 1420 (1968); Comment, The Tripartite Credit Card Transaction, 48 Calif. L. Rev., at 464–465.

"'As far as the merchant is concerned, he is in the same financial and legal position as if he were receiving certified checks on a bank that does not clear at par, with no risk that the check will be returned or payment stopped, or as if he were receiving cash at a small discount for the bank's services. This firm bank commitment is what makes the merchant willing to accept a bank card as freely as cash and what makes the bank card as good as cash to its holder (and without the risks of carrying cash).

"'Under these arrangements, the card-issuing bank takes all the credit risk, which is appropriate to the banking function it performs, the cardholder selects the merchant with whom he will deal, and the bank and the cardholder-purchaser expect the merchant to assume the merchandise risk. It is this division and allocation of risks between merchant and bank which permits the bank card to be used as though it were cash with hundreds of thousands of participating merchants throughout the country and abroad.'" Cleveland, Bank Credit Cards: Issuers, Merchants, and Users, 90 Banking L. J. 719, 723–724 (1973), quoting Statement of the American Bankers Association, the Consumers Bankers Association, Interbank Card Association, and National BankAmericard, Inc. to the Federal Trade Commission in the matter of Revised Proposed Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 4–5 (Mar. 5, 1973).

[3] Section 133 (a) of the Truth in Lending Act limited the cardholder's liability for the unauthorized use of his credit card to $50. 84 Stat. 1126, 15 U. S. C. § 1643 (a).

> mails was crucial to the total success of the fraudulent project. We are not justified in chopping up . . . the scheme into segments and isolating one part from the others. That would be warranted if the scheme were to defraud [only the merchants]. But it is plain that these plans had a wider reach and that but for the use of the mails they would not have been finally consummated." *Kann* v. *United States, supra,* at 96 (DOUGLAS, J., dissenting).

Since it was the card-issuing bank that was actually defrauded, the mails were employed "for the purpose of executing [the] scheme . . . ."

II

The mails further contributed to the realization of respondent's fraudulent scheme by creating the delay in detecting the fraud that necessarily results from the time-consuming processing of credit card invoices by mail. See *United States* v. *Chason,* 451 F. 2d 301, 303–304 (CA2), cert. denied, 405 U. S. 1016 (1971). During his two-week, $2,000 transcontinental spending spree, respondent took full advantage of this inevitable delay to continue his unlawful activities. If the motel owners had employed an instantaneous identification or verification system, respondent's fraudulent scheme would most likely have been nipped in the bud. But the simple truth of the matter is that they did not. As a direct consequence of the prevailing business practice of mailing invoices to the issuer for subsequent billing to the card holder and the system's attendant time delays, respondent was able to buy valuable time to postpone detection and thereby execute his scheme.

The majority mysteriously ignores prior decisions that 18 U. S. C. § 1341 reaches "cases where the use of the mails is a means of concealment so that further frauds

which are part of the scheme may be perpetrated." *Kann* v. *United States, supra,* at 94–95. See *United States* v. *Hendrickson,* 394 F. 2d 807 (CA6 1968), cert. denied, 393 U. S. 1031 (1969); *United States* v. *Riedel,* 126 F. 2d 81, 83 (CA7 1942); *United States* v. *Lowe,* 115 F. 2d 596, 599 (CA7), cert. denied, 311 U. S. 717 (1940). Moreover, it fails to take appropriate account of our most recent decision construing § 1341. In *United States* v. *Sampson,* 371 U. S. 75 (1962), an indictment for mail fraud had been dismissed by the District Court on the ground that the mailings after the money had already been obtained from the victims were not "for the purpose of executing" the scheme to defraud. We reversed.

> "We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes." *Id.,* at 80 (footnote omitted).

As previously indicated, the indictment here charged that respondent knew that the delay inherent in the posting and mailing of the credit card invoices would enable him to continue making purchases with the purloined card before his criminal conduct could be detected. Respondent engaged in a criminal enterprise that is by its very nature short-lived. Every time delay in the

card holder's receipt of the forged credit card slips allows the scheme to continue that much longer. For my part, the indictment charged a crime under 18 U. S. C. § 1341, and the Government established respondent's guilt beyond a reasonable doubt.

III

The majority's decision has ramifications far beyond the mere reversal of a lone criminal conviction. In this era of the "cashless" society, Americans are increasingly resorting to the use of credit cards in their day-to-day consumer purchases. Today well over 300 million credit cards are in circulation, and annual charges exceed $60 billion. In 1969 alone, 1.5 million credit cards were lost or stolen, resulting in fraud losses exceeding $100 million. 115 Cong. Rec. 38987 (1969). Current estimates of annual credit card fraud losses are put as high as $200 million. Cleveland, Bank Credit Cards: Issuers, Merchants, and Users, 90 Banking L. J. 719, 729 (1973). Under the result reached by the majority, only those credit card frauds exceeding $5,000 covered by 15 U. S. C. § 1644 will be subject to federal criminal jurisdiction.

Yet this burgeoning criminal activity, as evidenced by the very facts of this case, does not recognize artificial state boundaries. In the future, nationwide credit card fraud schemes will have to be prosecuted in each individual State in which a fraudulent transaction transpired. Here, for example, respondent must now be charged and tried in California, Louisiana, and Florida. This result, never intended by Congress, may precipitate a widespread inability to apprehend and/or prosecute those who would hijack the credit card system.

I dissent.